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Supreme Court of the United States

OCTOBER TERM, 1970

No. 203

DENNIS COUNCLE MCGAUTHA, *Petitioner,*

—v.—

STATE OF CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 204

JAMES EDWARD CRAMPTON, *Petitioner,*

—v.—

STATE OF OHIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 203

DENNIS COUNCLE MCGAUTHA, *Petitioner,*

—v.—

STATE OF CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 204

JAMES EDWARD CRAMPTON, *Petitioner,*

—v.—

STATE OF OHIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. One of its charter purposes is to provide free legal assistance to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel. For many years, LDF attorneys have represented in this Court and the lower courts persons charged with capital crimes, particularly Negroes charged with capital crimes in the Southern States.

(2) A central purpose of the LDF is the legal eradication of practices in American society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless—who too often are Negroes. To further this purpose, the LDF established in 1965 a separate corporation, the National Office for the Rights of the Indigent (NORI) having among its objectives the provision of legal representation to the poor in individual cases and advocacy before appellate courts in matters that broadly affect the interests of the poor.

(3) The long experience of LDF attorneys in the handling of death cases has convinced us that capital punishment in the United States is administered in a fashion that consistently makes racial minorities, the deprived and the downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. We believe that this and other grave injustices are referable in part to the fundamental character of the death penalty as an institution in modern American society,[1] and in part to common

[1] This point is developed at length in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v.

practices in the trial of capital cases which depart alike from the standards of an enlightened criminal justice and from the minimum requirements of fairness and even-handedness fixed by the Constitution of the United States for proceedings by which life may be taken. Finally, we have come to appreciate that in the uniquely stressful processes of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many pressures and conflicts may impede the presentation of effective attacks on these unfair and unconstitutional practices;[2] and that in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstance that the inmates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in the face of death.[3]

Alabama, 395 U.S. 238 (1969) (O.T. 1968, No. 642), wherein we urged that the death penalty was a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

[2] Two of these practices are at issue in the present cases. Others are described in our *amici curiae* brief in *Boykin* v. *Alabama*, note 1 *supra*, at pp. 3-7, nn. 6, 7; and in the Brief *Amici Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (O.T. 1967, No. 1015), pp. 12-28.

[3] In 1967, counsel for the *amici* instituted the case of *Adderly* v. *Wainwright*, U.S.D.C., M.D. Fla., No. 67-298-Civ-J, by a class-action petition for a writ of habeas corpus on behalf of all condemned men in the State of Florida. In connection with the District Court's determination whether it should entertain such a proceeding in class-action form, it authorized counsel to conduct interviews of all the inmates of Florida's death row. The findings of these court-ordered interviews, subsequently reported by counsel to the court and relied upon in the court's decision that class-action proceedings were proper, indicated that of the 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself); 11 others were represented by volunteer lawyers associated with the LDF or the ACLU; and in the case of two more, the status of

(4) For these reasons, *amici* LDF and NORI undertook in 1967 to represent all condemned men in the United States for whom adequate representation could not otherwise be found. In less than three years, we have come to represent about 200 of the approximately 550 men on death row,[4] and to provide consultative assistance to attorneys for a large number of the others. In this Court, we represent twenty-one men and one woman under sentences of death, whose cases are pending on petitions for certiorari that raise one or both of the issues presented by the present cases. We briefed and argued those issues before the Court in *Mar-*

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legal representation was unascertainable. All 34 men (and all other men interviewed on the row) were indigent; the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution and maintenance of legal proceedings) was below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial laborers; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed). These findings parallel those both of scholars who have undertaken to describe the characteristics of the men on death row, e.g., Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297, 1337-1339, 1376-1379, 1384-1385, 1418 (1969), and of officials experienced in dealing with death-row inmates, e.g., DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71, 72 (1964):

> "I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective."

Accord: LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 256-257.

[4] See note 18 *infra*.

well v. *Bishop*, —— U.S. ——, 26 L. Ed.2d 221, 90 S. Ct. 1578 (1970) (O.T. 1969, No. 13), and handled the California Supreme Court case of *In re Anderson*, 69 Cal.2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), upon which that court's decision in the present *McGautha* case rests. The *Anderson* matter is currently pending on petition for certiorari as O.T. 1970, Misc. No. 5118.

(5) We seek to file this brief *amici curiae*, urging reversal, in order to place the issues before the Court in a broader perspective than that provided by these two California and Ohio cases. Presentation of the broader perspective is particularly important because, in certain aspects, California and Ohio capital-trial practices differ from those of many other States—for example, the Arkansas practice involved in *Maxwell* v. *Bishop*. We shall explore those differences and their significance. It is not our purpose to rehash the arguments that we made so recently in *Maxwell*. For the Court's convenience, should it wish to consult those arguments, we append our *Maxwell* brief to this one (Appendix A, *infra*). It develops our basic constitutional contentions. In the body of this present brief, we advance several additional considerations that we think should be brought to the attention of the Court, relative to the interest of the 550 men (and, insofar as we are advised, 3 women) whose lives immediately depend upon what the Court decides herein.

(6) Both parties in *McGautha* and petitioner in *Crampton* have consented to the filing of a brief *amici curiae* by LDF and NORI. The present motion is necessitated because counsel for the State of Ohio has refused consent in *Crampton*.

WHEREFORE, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

Summary of Argument

I.

The power of the States to punish crime with death is not in issue here. What is in issue is their use of an arbitrary system to select the men who die. The basic irrationality of capital punishment may make the designing of non-arbitrary selective procedures more difficult than the use of arbitrary ones. But it cannot, consistent with Due Process, justify arbitrary procedures.

II.

A procedure by which jurors are empowered to choose between life and death without standards or principles of general application to guide and confine that choice is essentially lawless. For the reasons developed in our brief in *Maxwell* v. *Bishop*, it violates the rule of law basic to Due Process. The California and Ohio versions of the procedure challenged here are not constitutionally differentiable from the Arkansas procedure at issue in *Maxwell*.

III.

Ohio's single-verdict capital trial procedure is also unconstitutional for the reasons that we urged against Arkansas' similar procedure in *Maxwell*.

IV.

A decision invalidating standardless capital sentencing by juries or the single-verdict capital trial procedure should be given fully retroactive effect, to the extent of forbidding execution of the sentence of death upon any man condemned to die under those procedures.

ARGUMENT

I.

Introduction.

As the Court begins anew to deliberate the difficult constitutional questions raised by standardless capital sentencing and by the single-verdict capital trial procedure, it is vital to identify succinctly what is, and what is not, legally at issue and practically at stake.

The federal constitutionality of capital punishment, as such, is not in question. The only question is whether certain *procedures* for administering capital punishment comply with basic safeguards of the Constitution designed to forbid the use of arbitrariness as a tool of American government.[5] That limitation of the issue has several important implications.

First, the interest that the States of California and Ohio are asserting in these cases is not an interest in the maintenance of the death penalty for the crime of murder. Nothing that the Court could conceivably decide in either case would deprive the States (or the National Government) of the power to employ death as a punishment for any crime. To the extent that this extreme resort is legislatively believed to be a necessary and proper means of social

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[5] "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966). For "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

defense, no holding of this Court herein would or could disable it.

Second, the interest that the States are asserting here is not an interest in the regular and systematic use of the punishment of death as an instrument of state penal policy. It is not a considered legislative prescription of that punishment for all or most murderers or other "capital" criminals, or for any legislatively determined sub-class, kind, type or sort of murderers or "capital" criminals. It is not a legislative determination that any societal interest makes it necessary and proper that Dennis Councle McGautha or James Edward Crampton or any other man or woman convicted of murder should forfeit his life. For not only have the legislatures of California and Ohio failed to decide the question when, if ever, some interest of society requires that life be taken; they have failed to provide procedures by which any responsible organ of government decides that question.

Consistently with the capital punishment laws of those States, California and Ohio juries might *never* sentence a murderer to die; they might sentence all murderers to die; or, if—as is most likely—they distinguish some murderers from others, they are perfectly free to kill some and spare the remainder for reasons which have absolutely no relation to the purposes for which capital punishment was legislatively authorized in the first place. For the moment, we are not concerned with the constitutional issues raised by this sort of procedure, but only with the States' interest in maintaining it. That interest is manifestly not any one that might be served by the efficient selective use of death as an anti-crime device, since the very methods of selectivity in question here preclude decision of the question who shall

live and who shall die conformably with principles of anti-crime efficiency—or any other principles in which the State may have a stake.

Third, the States' interest here is not in preserving procedures that either are or have been determined legislatively to be essential for the administration of capital punishment. That is obvious enough with regard to the single-verdict procedure (since six States, including California, now use a form of split-verdict procedure for the trial of capital cases);[6] but, as regards the matter of the arbitrary discretion given juries in capital sentencing, the Attorneys General of Arkansas and California appeared to have been urging this Court in *Maxwell* v. *Bishop* either that the formulation of standards for non-arbitrary capital sentencing was impossible, or at least that the Court should respect the legislative judgment that it was impracticable.

The argument of impossibility ignores alike history and the existence of contemporary models of standards for capital sentencing. The historical oversight is glaring, inasmuch as prior to the advent of the Twentieth Century, virtually all capital statutes provided standards for imposing the death sentence: namely, the legislative definition of the capital crime itself. Mandatory capital crimes provide one form of standards for the imposition of the death penalty, although not the only form. For centuries, legislatures evolved those standards; and during the Nineteenth, particularly, legislatures in this country and in England drastically reduced the reach of the death penalty

[6] Effective July 1, 1970, Georgia became the sixth State. Ga. General Assembly, 1970 Sess., H.B. No. 228. The other five States are California, Connecticut, New York, Pennsylvania and Texas. See our *Maxwell* brief, Appendix A *infra*, pp. 77-78 n. 79.

both by removing some crimes from the roster of capital offenses and by redefining or subdividing others—providing, for example, degrees of murder.[7] So it is rather surprising to hear advanced today, in support of standardless capital sentencing, the precise argument used by Archdeacon William Paley in 1785 to justify England's "Bloody Code" of more than 250 capital crimes: that because "it is impossible to enumerate or define beforehand . . . those numerous unforeseen, mutable and indefinite circumstances, both of the crime and the criminal, which constitute or qualify the malignity of each offence," the proper course is to "[sweep] into the net every crime which, under any possible circumstances, may merit the punishment of death; but, when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out" for the actual business of dying. "The wisdom and humanity of this design," Paley concluded, "furnish a just excuse for the multiplicity of capital offences, which the laws of England are accused of creating beyond those of other countries."[8]

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[7] The first jurisdiction to divide murder into degrees was Pennsylvania, by a statute of 1794. Pa. Laws 1794, ch. 257, §§1-2. That statute, like its successors which were enacted in virtually every one of the United States during the following century, reserved the death penalty for murder in the first degree. Its Preamble recited that public safety was best secured by moderate and certain punishments, rather than by severe and excessive ones, that "it is the duty of every Government to endeavor to reform, rather than exterminate offenders, and [that] the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety."

[8] PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (11th Amer. ed. 1825), 384-386:

> "There are two methods of administering penal justice.
>
> "The first methods assigns capital punishments to few offences and inflicts it invariably.

(*footnote continued on next page*)

Paley's sanguinary peroration furnishes an exact counterpart of the argument made before this Court by California in the *Maxwell* case: that standardless capital sentencing is warranted by the State's interest in retaining the death penalty while preserving the quality of "mercy" unconstrained. We shall return shortly to this ironic invocation of the concept of mercy to justify arbitrary procedures for killing people. At this juncture, it suffices to say that the

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"The second method assigns capital punishments to many kinds of offences, but inflicts it only upon a few examples of each kind.

"The latter of which two methods has been long adopted in this country, where, of those who receive sentence of death, scarcely one in ten is executed. And the preference of this to the former method seems to be founded in the consideration, that the selection of proper objects for capital punishment principally depends upon circumstances, which however easy to perceive in each particular case after the crime is committed, it is impossible to enumerate or define beforehand; or to ascertain however with that exactness, which is requisite in legal definitions. Hence, although it be necessary to fix by precise rules of law the boundary on one side . . ., that nothing less than the authority of the whole legislature be suffered to determine that boundary, and assign these rules; yet the mitigation of punishment, the exercise of lenity, may without danger be entrusted to the executive magistrate, whose discretion will operate upon those numerous unforeseen, mutable and indefinite circumstances, both of the crime and the criminal, which constitute or qualify the malignity of each offence. . . .

"For if judgment of death were reserved for one or two species of crimes only (which would probably be the case if that judgment was intended to be executed without exception), crimes might occur of the most dangerous example, and accompanied with circumstances of heinous aggravation, which did not fall within *any* description of offenses that the laws had made capital, and which consequently could not receive the punishment their own malignity and the public safety required. . . .

"The law of England is constructed upon a different and a better policy. By the number of statutes creating capital

interest of mercy, like the other interests that we have identified thus far, is nowise threatened by petitioners' contentions in these cases. Their argument against arbitrary capital sentencing is not an argument for mandatory capital crimes (although, of course, the enactment of mandatory capital crimes would avoid it, in the fashion of throwing the baby out with the bath). It is an argument that where discretion is given to a legal tribunal in a matter so grave as the taking or sparing of human life, that discretion must be suitably refined, directed and limited, so as to ward against wholly lawless caprice. Devices for providing that kind of protection are quite readily available which nevertheless allow the capital-sentencing jury (not to speak of the Governor)* ultimate powers of mercy.

We mentioned above certain contemporary models of such devices, principally the capital-sentencing provisions

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offences, it sweeps into the net every crime which, under any possible circumstances, may merit the punishment of death; but, when the execution of this sentence comes to be deliberated upon, a small proportion of each class are singled out, the general character, or the peculiar aggravations, of whose crimes render them fit examples of public justice. By this expedient, few actually suffer death, whilst the dread and danger of it hang over the crimes of many. . . . The wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offences, which the laws of England are accused of creating beyond those of other countries. . . ."

* We hardly need say that nothing involved in these cases, or in petitioners' arguments, touches the clemency power of the executive. Conversely, to recognize the unfettered character of that power is not to legitimate giving a similar power to sentencing juries. It is one thing to say that a man, once condemned to die by procedures whose lawful regularity satisfies the concerns of Due Process, may then be subjected to the unlimited authority of commutation. It is quite another thing to say that a man may be killed pursuant to a process which at *no* stage of the decision to kill him satisfies Due Process concerns.

of the Model Penal Code[10] and of the Study Draft recently published by the National Commission on Reform of Federal Criminal Laws.[11] Both of these provisions use a variety of means to assure regularity and delimit discretion in capital sentencing: the prescription of circumstances which *exclude* the death penalty; the requirement of specified findings which *allow* the death penalty; the enumeration of criteria for determination in cases where it is allowed; and the subjection of that determination to judicial review at the trial and appellate levels under the same criteria. Alternatively, capital sentencing procedures could be designed along the lines of the extended-sentencing provisions of the Model Sentencing Act of the N.C.C.D.,[12] directing specified inquiries into the defendant's background and propensities. These approaches might be combined, or others adopted.[13] None would prohibit either capital punishment or mercy, while restricting the jury's power simply to take away life arbitrarily.

As for the suggestion that California's or Ohio's legislature, or any other, has determined that these approaches are impracticable—a determination, so the suggestion goes, that this Court should respect—that is quite fallacious. To be sure, it is true that American legislatures have in fact given their juries arbitrary capital sentencing power, as

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[10] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6 (P.O.D., May 4, 1962), pp. 128-132.

[11] NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE, §§3601-3605 (1970), pp. 307-311.

[12] ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT, §§5-9 (1963).

[13] See our *Maxwell* brief, Appendix A, *infra* pp. 38-45, 63-64 n. 67.

once they were wont to give their police chiefs arbitrary powers of licensure of public meetings before this Court forbade. Often it is the easier course, legislatively, to cast the net overbroadly, particularly where the courts have not identified constitutional interests that require otherwise. But to read into such a course the determination that other courses are impracticable—as distinguished from merely more exacting—is to read what no legislature has written.

The plain fact of the matter is that the arbitrary death-sentencing procedures challenged in these cases and pervasive in the United States today represent the several legislatures' easy way out of the problem of devising workable methods of selection of the persons who should die, once mandatory capital punishment for murderers and other "capital" criminals became politically untenable. Wholesale execution of the persons guilty of these crimes is no longer tolerable to enlightened public opinion; differentiation among them is difficult, particularly since the purposes of the death penalty are diffuse, controversial, and—when exposed to rational debate—too unsubstantial to command agreement either upon those purposes themselves or upon the uses of the death penalty appropriate to achieve them;[14] so the matter is simply handed over to individual juries to kill or not, as they please.

And here one touches, we believe, the real interest of the States of California and Ohio in the present cases. That is an interest in maintaining the death penalty while avoiding the responsibility for rationalizing it to the extent necessary in order to assure its regular, consistent, non-arbitrary application. Or, to put the matter the other way around, it

[14] See note 154 *infra*.

is an interest precisely in maintaining *arbitrary* procedures for administration of the death penalty and selection of the men to die, lest, in the process of formulating non-arbitrary selective procedures, the death penalty be exposed to legislative and public scrutiny that might severely restrict or even wholly condemn it.

To this extent only do these cases implicate a possible restriction of state power to impose death as a penalty for crime. If petitioners prevail in both their claims here, a State which chooses to kill human beings in the service of some penal policy will have to give considered legislative attention to its reasons for doing so, and to the design of standards and procedures for selection of the men it will kill which conform to those reasons and assure their implementation in a regular, non-arbitrary fashion. Nothing more is at stake for the States.[15]

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[15] We have pointed out in our *Maxwell* brief, Appendix A *infra*, pp. 60-61, why a decision forbidding arbitrary capital sentencing by juries would not necessarily imply a like constitutional restriction upon non-capital jury sentencing in the relatively few States where juries determine penalty for non-capital crimes.

We have also pointed out, *id.*, at pp. 35-37, grounds which might distinguish capital jury sentencing from capital sentencing by judges. As a practical matter, in terms of the States' interest in this litigation, judge sentencing in capital cases involves no additional considerations. In every State which permits capital sentencing by judges alone (that is, not upon the recommendation of a jury), such judge sentencing is an alternative procedure to jury sentencing, usually available upon pleas of guilty or the defendant's waiver of jury trial. If these States are required to design constitutionally adequate standards for capital jury sentencing, those standards obviously can and will also be made to apply to capital sentencing by judges. All that is realistically at stake, therefore, in the question whether capital sentencing by juries and by judges is constitutionally distinguishable, is whether the men sentenced to death by judges acting without standards *prior* to the Court's decision of these instant cases shall live or die. As

On the other hand, what is at stake not merely for the individuals charged with capital crimes but for the entire system of criminal justice in these gravest of legal proceedings, is the rule of law that is fundamental to the Due Process Clause and to our very conception of government in a free society. The question is not, as California suggested in the *Maxwell* argument that it was, whether individual capital defendants would "do better" under regularized sentencing procedures or arbitrary ones. Some defendants undoubtedly would do better, and some would do worse. But they would do better or worse for reasons rationally related to the publicly exposed justifications for having the death penalty, not—as now—wholly arbitrarily. Our society is not bottomed on the rule of law because some of us "do better" for it. Our society is bottomed on the rule of law because, without it, irresponsible and arbitrary governmental action may destroy any one of us, and that destruction diminishes us all.

Perhaps at no time in American history has the rule of law been so important, and respect for it so precious, as they are now. Institutionalized arbitrariness, particularly in matters of life and death, critically undermines the rule of law and its just claim to respect. So it is a matter of the highest expediency, as well as a constitutional command, that (as the National Crime Commission recommended): "[Where a State chooses to retain capital punishment],

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we point out in our discussion of retroactivity, pp. 74-82 *infra*, the States' interest in killing any of these men is negligible.

The *federal* Government does, however, have a few, infrequently used capital statutes that confer sentencing discretion exclusively upon judges. As to these, any constitutional distinction between standardless capital sentencing by juries and standardless capital sentencing by judges would have future, as well as past, significance.

the types of offenses for which it is available should be strictly limited, and the law should be enforced in an evenhanded and nondiscriminatory manner, with procedures for review of death sentences that are fair and expeditious. When a State finds that it cannot administer the death penalty in such a manner, . . . the penalty should be abandoned." [16]

The problem, of course, is that arbitrary procedures for the imposition of capital punishment inevitably function to preclude both their own review and the reconsideration of the basic question of the death penalty. When the decision to kill human beings is made *ad hoc* and without reference to any articulated standards, policies or justifications, capital punishment escapes the sorts of legislative and public scrutiny necessary to assure either "evenhanded and nondiscriminatory" enforcement (*supra*), or conformity with "'the evolving standards of decency that mark the progress of a maturing society,'" (*Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), quoted in *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 n. 15 (1968)). For it is, once again, the easy way out—too easy, we think, where the matter of killing human beings is involved—for a legislature to leave undisturbed upon the statute books a capital punishment law whose evenhanded and nondiscriminatory enforcement it could not rationally support, and its public would abhor—so long as both the legislature and the public are assured that it need not in fact be evenhandedly and nondiscriminatorily applied. If a few poor ugly wretches are the only ones who have to actually die, and upon grounds

[16] President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967), 143.

not susceptible of examination or application to anyone else, capital punishment obviously escapes the fair scrutiny of public conscience, with its attendant pressure to keep the legislature acting decently. For the public can easily bear the rare and random imposition of a punishment which, if applied systematically and regularly, would make the common gorge rise.

But this is not the worst of it. The individual condemned man goes to his death not merely in the dubious service of a self-insulated, comprehensively arbitrary system, but as the result of a particular selective judgment made arbitrarily in his own case, singling him out without design or reason as the happenstance tribute of that system. He is picked to die, out of a group of identically situated defendants convicted of the same crime and thereupon permitted to live.[17] Perhaps his case differs in some aspects from theirs; perhaps it does not; no matter, since the sentencing jury is not required to consider either the differences or any principles that might make them relevant. It may simply elect to kill him or not, as it chooses, for any reason, or for no reason, and certainly for no reason that need or will be applied in the case of any other defendant. The notion that judgments upon any important issue should be made by a purported court of law in this fashion is incredible; but, that life-or-death judgments—and, in our system of law, *only* life-or-death judgments—should be so made, is positively mind-staggering.

Insofar as we can tell, there are now approximately five hundred and fifty-three condemned persons on the death

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[17] See our *Maxwell* brief, Appendix A *infra*, pp. 11-12.

rows of this country.[18] Five hundred and forty-eight of them have been sentenced to die under the arbitrary sentencing power challenged in these *McGautha* and *Crampton* cases.[19] For these men, as for the Court, the question that the cases present is not whether a State may constitutionally use death to punish crime. It is whether *they* may constitutionally be selected to die, from amongst their thousands of death-eligible compeers, by a process so fundamentally lawless that a small-claims court could not

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[18] The last available official figure was 479, as of December 31, 1968. See United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (August, 1969), p. 22. The Bureau of Prisons of the United States Department of Justice reported to us in response to our inquiry that the figures which they have compiled for the as yet unpublished National Prisoner Statistics Bulletin on Capital Punishment for 1969 place the figure of condemned persons at 525, as of December 31, 1969. Adjustment in light of the numbers of death sentences known to us to have been rendered, vacated and commuted during the first seven months of 1970 brings the number to the estimated 553 set forth in text.

[19] From the estimated total of 553, we exclude five who are under sentence of death in California for the only mandatory capital crime still in active use in the United States: assault with a deadly weapon or any means likely to cause great bodily injury by a prisoner under sentence of life imprisonment, where the person assaulted is not an inmate and dies, Cal. Pen. Code §4500. Among the remaining 548, we do not distinguish between men sentenced to die by juries (like McGautha and Crampton) and men sentenced to die by judges. Cf. note 15, para. 2, *supra*. So far as we are advised, no figures are available that would permit even a rough estimate of how many of the 548 persons under sentence of death for discretionary capital crimes were judge-sentenced.

We can make the estimate, however, that about 390 of them were sentenced to death under the single-verdict procedure also challenged in the *Crampton* case. This figure is derived by excluding from the 502 (1) all death-row inmates in California, Connecticut and Pennsylvania, (2) an estimated number in Texas tried since 1967, when that State adopted a split-verdict form of capital trial procedure, and (3) an estimated number of inmates in other jurisdictions sentenced to death after pleas of guilty. (Georgia's split verdict statute became effective only last month; and New York has no prisoners now under sentence of death.)

validly use it as the basis for rendering a five-dollar judgment.[20] That is the issue which this Court must decide.

We have made these introductory observations for one reason. It is to state precisely the significance of the questions of capital trial procedure now before the Court. From the point of view of the States, they are far less important than the ultimate question—not here presented—whether the Constitution, in particular the Eighth Amendment, permits the use of capital punishment at all. But from the point of view of constitutional principle, they are at least equally important.

Death, which creates their importance, also obscures it. For the enormity of death is such that the basic question—whether to permit its use as a punishment for crime—naturally tends to dwarf into apparent insignificance all questions relating to procedures for its imposition. So very difficult and emotionally exhausting is that basic question, that once legislative competence to use capital punishment has been granted—once it has been decided or assumed that someone can properly and legally be made to die—even the vital question, *who*, seems relatively picayune. That tendency is seconded by the notion that, since the legislature can sentence all condemned criminals of a sort to death, the process of sparing some but not others is an act of mercy, of whose mysterious workings none can legitimately complain. Besides, death is such an extraordinary thing, so beyond the pale of human reason, that to ask a legislature to deal reasonably with it, find reasonable bases for its imposition here and its extenuation there, surely is too much to ask.

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[20] See our *Maxwell* brief, Appendix A *infra*, p. 42.

But it is not too much to ask. Arbitrarily killing people is not "mercy." Who gets killed is not a picayune question. And the enormity of state-inflicted death is no reason for the attenuation of basic constitutional safeguards. It is a reason for heightened insistence upon those safeguards.

We have admitted above that the designing of non-arbitrary procedures for the administration of capital punishment would be more difficult for legislatures than continuation of the present arbitrary ones. Indeed, as we see it, the real question in these cases is whether the Constitution requires the legislatures to shoulder that difficulty. In other contexts, the avoidance of legislative difficulty might itself be a weighty constitutional concern. But legislation that extinguishes human life *should* be difficult at least to this extent: that the problem of providing regular and fundamentally lawful procedures for its administration must be responsibly met, and arbitrariness in those procedures not excused on the astounding ground that the death penalty is basically irrational anyway.

II.

The Issue of Standardless and Arbitrary Capital Sentencing Power.

A. The Nature of the Power

With a single exception,[21] all capital crimes currently in use in the United States involve the discretionary (that is, non-mandatory) imposition of the death penalty.[22] Practices for the selection of the men who will die for these crimes vary considerably, however, from State to State. We first describe the Ohio and California practices here in issue, and then contrast them with the discretionary capital-sentencing practices in use in other American jurisdictions.

1. *Ohio*

Non-capital sentencing in Ohio is done almost entirely by judges.[23] All capital sentencing is, however, done by

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[21] See note 19, *supra*.

[22] See our *Maxwell* brief, Appendix A *infra*, p. 26, n. 24.

[23] Juries trying non-capital criminal cases are required by statute to be told that they should not consider the question of punishment, and that punishment rests with the court. Ohio Rev. Code, §2945.11 (Ohio Gen. Code, §13442-9). See, e.g., *State* v. *Spino*, 90 Ohio App. 139, 104 N.E.2d 200 (1951). Judicial sentencing is generally discretionary within statutory limits, and the exercise of that discretion is not reviewable on appeal. *City of Toledo* v. *Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965); *Fleming* v. *State*, 34 Ohio App. 536, 171 N.E. 407 (1929), *aff'd*, 122 Ohio St. 156, 171 N.E. 27 (1930). But see *Montalto* v. *State*, 51 Ohio App. 6, 199 N.E. 198 (1935).

In regard to two non-capital crimes, juries do have sentencing power. They may decide whether the sentence for nighttime burglary of a dwelling and for bank robbery should be life imprisonment or some lesser term. Ohio Rev. Code, §2907.09 (Ohio Gen. Code, §12437); Ohio Rev. Code, §2907.141 (Ohio Gen. Code,

juries,[24] unless the defendant waives jury trial[25] or pleads guilty[26] to a capital offense. In either of these last instances, a statute provides for sentencing by a three-judge court,[27]

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§12441). See *State* v. *Sahadi*, 3 Ohio App.2d 209, 209 N.E.2d 758 (1964) (jury-waived case).

[24] Ohio has two mandatory capital crimes, neither of which has apparently ever been employed: Ohio Rev. Code §2901.09 (Ohio Gen. Code, §12406) (killing the President or a person in the line of presidential succession); Ohio Rev. Code, §2901.10 (Ohio Gen. Code, §12407) (killing the Governor or Lieutenant Governor). Ohio's remaining capital statutes—six in number—confer sentencing discretion upon the jury. See note 30 *infra*.

[25] A capital defendant has a right to waive a jury and insist upon a bench trial in a capital case. *State* v. *Smith*, 123 Ohio St. 237, 174 N.E. 768 (1931).

[26] The trial court has discretion to decline to accept a guilty plea. See *State* v. *Ferranto*, 112 Ohio St. 667, 148 N.E. 362, 365 (1925); *State* v. *Frohner*, 150 Ohio St. 53, 80 N.E.2d 868, 885 (1948).

[27] Ohio Rev. Code, §2945.06 (Ohio Gen. Code, §13442-5). For instances of the statute's application in a case of jury waiver, see *State* v. *Stewart*, 176 Ohio St. 156, 198 N.E.2d 439 (1964); and in cases of guilty pleas, see *State* v. *Frohner*, 150 Ohio St. 53, 80 N.E.2d 868 (1948); *State ex rel. Scott* v. *Alvis*, 156 Ohio St. 387, 102 N.E.2d 845 (1951); *State* v. *Ferguson*, 175 Ohio St. 390, 195 N.E.2d 794 (1964); *State* v. *Lucear*, 93 Ohio App. 281, 109 N.E.2d 39 (1952).

The three-judge statute dates from 1933. 115 Ohio Laws 531 (S.B. No. 90, §1). Prior to that date, one judge could take a guilty plea in a capital case and exercise the jury's sentencing discretion, *State* v. *Habig*, 106 Ohio St. 151, 140 N.E. 195 (1922); *State* v. *Ferranto*, 112 Ohio St. 667, 148 N.E. 362 (1925); *State ex rel. Evans* v. *Eckle*, 163 Ohio St. 122, 126 N.E.2d 48 (1955); *Beard* v. *State*, 64 Ohio Law Abs. 532, 112 N.E.2d 832 (1951); although, apparently, three judges were sometimes convened in such cases, as a matter of practice and upon consent of the parties, see *Hoppe* v. *State*, 29 Ohio App. 467, 163 N.E. 715 (1928). The effect of the 1933 statute was to withdraw capital sentencing power from a single judge, *Ex parte Knight*, 73 Ohio App. 547, 57 N.E. 2d 273 (1944), but it did not otherwise affect the nature of the sentencing discretion committed to judicial exercise in cases of pleas or jury waivers. See note 28 *infra*.

which is granted sentencing powers identical to those ordinarily exercised by capital juries.[28]

The provision conferring capital sentencing discretion upon juries dates from 1898.[29] It is now found, in identical form, in each of Ohio's five non-mandatory capital statutes.[30] The archetypal statute, involved in the *Crampton* case, is Ohio Rev. Code, §2901.01 (Ohio Gen. Code, §12400), which provides that:

> "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life."

Construing this provision, the Ohio Supreme Court has said that: "Whether or not a recommendation of mercy shall be made upon finding an accused guilty of murder in

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[28] *State* v. *Habig*, 106 Ohio St. 151, 140 N.E. 195, 199 (1922); *State* v. *Ferranto*, 112 Ohio St. 667, 148 N.E. 362, 367 (1925); *State* v. *Frohner*, 150 Ohio St. 53, 80 N.E.2d 868, 885 (1948); *State* v. *Lucear*, 93 Ohio App. 281, 109 N.E.2d 39, 41 (1952).

[29] 93 Ohio Laws 223 (S.B. No. 504). See *State* v. *Ellis*, 98 Ohio St. 21, 120 N.E. 218 (1918); *State* v. *McClellan*, 12 Ohio App.2d 204, 232 N.E.2d 414, 417 (1967).

[30] Ohio Rev. Code, §2901.01 (Ohio Gen. Code, §12400) (first-degree murder); Ohio Rev. Code, §2901.02 (Ohio Gen. Code, §12401) (killing by obstructing or injuring a railroad); Ohio Rev. Code §2901.03 (Ohio Gen. Code, §12402) (killing of a guard by a prisoner); Ohio Rev. Code, §2901.04 (Ohio Gen. Code, §12402-1) (killing a police officer in the discharge of his duties); Ohio Rev. Code, §2901.27 (Ohio Gen. Code, §12427) (kidnapping or maiming for the purpose of extortion, where the person kidnapped has not been liberated unharmed); Ohio Rev. Code, §2901.28 (Ohio Gen. Code, §13386) (killing a kidnapped person by designated means).

the first degree is a matter vested fully and exclusively in the discretion of the jury." [21]

The only restriction placed upon the jury's absolute discretion is that a recommendation of mercy must in some way be based upon the evidence presented at trial. As the Ohio courts put it:

> "[T]he General Assembly has given to the jury an absolute discretion to recommend mercy which discretion should be exercised in view of all the facts and circumstances described by the evidence. . . . This matter is confided fully and exclusively to such discretion of the jury." [22]

"Evidence," in this context, means the evidence presented at the single-verdict trial upon the issue of guilt or innocence. No evidence may "be introduced directed specifically toward a claim for mercy" since the question of life or death itself is "a matter entirely within [the jury's] . . . discretion," and therefore "not an issue in the case." [23]

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[21] *State* v. *Ellis*, 98 Ohio St. 21, 120 N.E. 218 (1918) (Court's Syllabus, 120 N.E., at 218). See also *Liska* v. *State*, 115 Ohio St. 283, 152 N.E. 667, 668 (1926) ("The recommendation of mercy rests wholly in the sound discretion of the jury. They may extend or withhold as they see fit"); *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935) (Court's Syllabus, 197 N.E., at 214) ("The action of a jury in recommending or failing to recommend mercy in a first-degree murder case is a matter entirely within its discretion. . . . ").

[22] *State* v. *Tudor*, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950); see also *Ex parte Knight*, 73 Ohio App. 547, 57 N.E.2d 273, 275 (1944).

[23] *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935) (Court's Syllabus, 197 N.E., at 214).

The concept that a capital jury is required to base any decision in favor of mercy[34] upon the evidence derives from the leading case of *Howell* v. *State,* 102 Ohio St. 411, 131 N.E. 706 (1921), which held that it was not error to charge the jury, upon a first degree murder conviction, "to consider and determine whether or not, in view of all the circumstances and facts leading up to and attending the alleged homicide as disclosed by the evidence, you should or should not make such recommendation."[35] The *Howell* court determined, as stated in its syllabus, that:

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[34] Under the Ohio statute, the death penalty is decreed unless the jury returns a verdict affirmatively recommending mercy. *State* v. *Klumpp,* 15 Ohio Ops.2d 461, 175 N.E.2d 767, 775 (1960), *app. dism'd,* 171 Ohio St. 62, 167 N.E.2d 778 (1960). So the effect of the requirement that the jury base its recommendation upon evidence is to demand an affirmative evidentiary ground only in the case of a decision to spare the defendant's life. The decision to kill him need have no such basis. See *Massa* v. *State,* 37 Ohio App. 532, 175 N.E. 219, 221-222 (1930) (finding a claim of error going to penalty nonprejudicial since the appellate court can find nothing in the record that might have supported a recommendation of mercy); and see *State* v. *Karayians,* 108 Ohio St. 505, 141 N.E. 334, 336 (1923).

[35] In sustaining this charge, the court adopted the State's contention that "while the discretion of the jury may be unrestricted and absolute, it must be exercised only in view of the evidence, and must be confined to the facts and circumstances produced or lacking in the trial of the case." 131 N.E., at 707.

> "It may be true, and some courts so hold, that the function of a court, in permitting the jury to make a recommendation respecting mercy, is best fulfilled by simply giving the terms of the statute to the jury and informing them that the making or withholding of the recommendation is a matter entirely within their discretion. In such case, of course, it would be presumed that the jury would fulfill their duty from a consideration of the case as presented to them as sworn jurors. But in arriving at a determination with reference to this recommendation they should be guided by the evidence, or lack of evidence, as the case may be, as disclosed upon the trial. It would be a travesty upon justice were the jury

"Section 12400, General Code, giving the jury discretion to recommend mercy in cases of conviction of first degree murder, confers an absolute discretion which should not be influenced by the court. However, this discretion should be exercised in view of all the facts and circumstances disclosed by the evidence."

It should be noted that, while the *Howell* charge itself spoke of "all the circumstances and facts leading up to and attending the . . . homicide," the *Howell* syllabus spoke more broadly, in terms of "all the facts and circumstances disclosed by the evidence." To the extent that these two notions differ,[35] it is the latter one that has subsequently

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permitted to ignore the evidence and rest their conviction upon their conscientious scruples against imposing capital punishment, or take into consideration facts which may have come to their knowledge while they were not acting in their capacity as jurors. That was not the purpose of the law. We hold, therefore, that the trial court did not commit error in charging the jury as it did." (131 N.E., at 709; see also *id.*, at 707.)

The court's concern lest a recommendation of mercy be based on "conscientious scruples" is said to flow from (but is somewhat puzzling in light of) the Ohio legislature's exclusion of scrupled jurors from capital juries. See *id.*, at 707. Ohio excluded such jurors at the time of *Howell* (while permitting jurors scrupled *in favor of* capital punishment to sit, see *State* v. *Ellis*, 98 Ohio St. 21, 120 N.E. 218 (1918)), and still does. See *State* v. *Pruett*, 18 Ohio St.2d 167, 248 N.E.2d 605 (1969); *State* v. *Wigglesworth*, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969); *State* v. *Eaton*, 19 Ohio St.2d 145, 249 N.E.2d 897 (1969); *State* v. *Carter*, 21 Ohio St.2d 212, 256 N.E.2d 714 (1970).

[35] Of course, the circumstances "leading up to and attending the . . . homicide" might or might not be conceived to include background facts concerning the defendant. This is not the only ambiguity in *Howell*. Although the *Howell* charge and syllabus seem to say that a decision either way on the question of life or death must be based upon the evidence, the effect of the charge within the context of Ohio practice is to require only that a *favorable* recommendation be based upon the evidence. See note

become anchored in Ohio law. The model jury charge that has evolved to embody the *Howell* principle appears to be the one approved in *State* v. *Caldwell*, 135 Ohio St. 424, 21 N.E.2d 343, 344 (1939):

> "[If you find the defendant guilty of first degree murder,] then you will have one further duty to perform, and that is, you will determine whether or not you will extend or withhold mercy. . . . In that connection whether you recommend or withhold mercy is a matter solely within your discretion, calling for the exercise of your very best and most profound judgment, not motivated by considerations of sympathy or as a means of escaping a hard or disagreeable duty, but must be [sic] considered by you in the light of all the circumstances of the case with respect to the evidence submitted to you and the other circumstances surrounding this defendant." [37]

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34 *supra*. That effect is consonant with the *Howell* opinion, which appears most concerned lest the jurors go outside the record (for example, to considerations of "conscientious scruples") in deciding *to* recommend mercy. See note 34 *supra*. See also the post-*Howell* ambiguity noted in note 37 *infra*.

[37] Although the concept of *Howell* was to limit a recommendation of mercy to a basis of circumstances "disclosed by" the evidence, the *Caldwell* charge speaks of the evidentiary circumstances of the case *and* "the other circumstances surrounding this defendant." It is not plain whether these latter circumstances need to be determined from the evidence. Presumably they do (see the following paragraph), but the confusion is compounded by the jury charges approved in *Rehfeld* v. *State*, 102 Ohio St. 431, 131 N.E. 712, 713 (1921) ("circumstance or fact in the case, or . . . all the evidence"), and *State* v. *Pierce*, 44 Ohio Law Abs. 193, 62 N.E.2d 270, 273 (Ohio App. 1945) ("consideration of the evidence, the character of the crime and the attending circumstances"), note 38 *infra*.

In the *Caldwell* case itself, the jury returned to ask for further instructions concerning the question of mercy, and the following colloquy occurred:

> "The Foreman: What are grounds for granting mercy?
>
> "The Court: That rests solely and wholly in your sound discretion. You should determine whether or not in your

The *Howell-Caldwell* charge is approved by the Ohio appellate courts whenever it is given,[35] but it does not appear mandatory to give it. Jury charges have been

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discretion mercy should be granted from a consideration of the evidence, the character of the crime and the attending circumstances. . . .

"The Foreman: . . . What are extenuating circumstances? Are they something which we can determine in our own judgment alone?

"The Court: No, if there are any, you must determine them from the evidence.

. . . . .

"The Foreman: Well, then, may we consider sociological matters and environment in determining this question of mercy?

"The Court: No—they have nothing whatever to do with this case."

These supplemental instructions were sustained on the appeal.

[35] See *State* v. *Eaton*, 19 Ohio St.2d 145, 249 N.E.2d 897, 907 n. 4 (1969); *State* v. *Pierce*, 44 Ohio Law Abs. 193, 62 N.E.2d 270, 273 (1945). In *Pierce*, the trial judge initially charged:

"Now, the question of recommendation of mercy . . . is a matter the law leaves entirely with you, and I give you this in charge: you may recommend, if in your judgment you think you are justified in doing so. It is for you to say whether all the facts in the case warrant you in making or not making such recommendation, but you are not limited or circumscribed in any respect. The law prescribed [sic] no rule for the exercise of your discretion. It is a matter entirely with you."

When the jury returned with a request that this passage be read again, the judge instead gave the substance of the *Caldwell* charge, and added: "You should determine whether or not in your discretion mercy should be granted from a consideration of the evidence, the character of the crime and the attending circumstances."

See also *Rehfeld* v. *State*, 102 Ohio St. 431, 131 N.E. 712, 713 (1921), where the following charge was approved:

"This right or option [to recommend mercy] may be exercised by the jury under the same evidence which would justify the return of a verdict the punishment of which is death in the electric chair. It is entirely within your province and

sustained which do no more than tell the jurors that they have an option of mercy.[39] Whether the latter form of charge would be in error as against a specific request to charge in the language of *Howell* and *Caldwell* is unclear,[40] but probably it would not.[41]

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your discretion to say whether there is any circumstance or fact in the case, or whether from all the evidence you believe that, notwithstanding his guilt of murder in the first degree, mercy or clemency should be extended. If you do recommend mercy, the court is bound to reduce the punishment to life imprisonment. It is a matter wholly within the discretion of this jury."

[39] *State* v. *Karayians*, 108 Ohio St. 505, 141 N.E. 334, 335 (1923) ("the jury may recommend mercy, and, in that event, that . . . should be set forth in your verdict"); *Massa* v. *State*, 37 Ohio App. 532, 175 N.E. 219, 221 (1930) ("you have a right to recommend mercy provided you see fit to do so"). In *Karayians*, the Ohio Supreme Court characterized the instruction telling the jury that it might make a recommendation of mercy as "unaccompanied by any restriction or limitation whatever upon their discretion to make such recommendation." 141 N.E., at 336. And see *State* v. *Schiller*, 70 Ohio St. 1, 70 N.E. 505 (1904).

[40] The issue is unlikely to arise. We have pointed out at notes 34, 36 *supra*, that—because of the fashion in which Ohio law casts the burden of persuasion by requiring an affirmative recommendation of mercy in order to spare the defendant's life—the *Howell-Caldwell* charge restricts the bases upon which the jury may let the defendant live but not those upon which it may kill him. Defense counsel cannot, therefore, practicably request the charge.

In the present *Crampton* case, the jury was told only that the punishment for first degree murder "is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life." (*Crampton Appendix*, p. 70.) It was handed a verdict form with a line "which you must fill in. We—blank—recommend mercy and you will put in that line, we do, or, we do not, according to your finding." (*Crampton Appendix*, p. 71.) No other instructions relevant to the question of life or death were given, except that when the jury during its deliberations sent in a note asking "Does the vote have to be unanimous for recommendation?" the court sent back the written response: "Yes." (*Crampton Trial Transcript*, pp. 436-437.)

[41] We infer this from the broad discretion to charge or not to charge specific matters relative to the question of mercy that is

One point is clear, however. An Ohio jury's death verdict is absolutely final. It may not be reviewed or set aside by any court.[42]

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recognized in the line of Ohio decisions dealing with instructions on the *consequences* of a recommendation of mercy. Under these decisions, the trial judge may explain or decline to explain matters of possible pardon, commutation and parole incident to a sentence of life imprisonment, as he pleases. The preferred procedure appears to be to say nothing about such matters, but the judge has discretion to charge on them and will not be reversed if he does. *State* v. *Meyer*, 163 Ohio St. 279, 126 N.E.2d 585 (1955); *State* v. *Henley*, 15 Ohio St.2d 86, 238 N.E.2d 773 (1968). And see *State* v. *Schiller*, 70 Ohio St. 1, 70 N.E. 505 (1904); *Liska* v. *State*, 115 Ohio St. 283, 152 N.E. 667 (1926); *State* v. *Tudor*, 154 Ohio St. 249, 95 N.E.2d 385 (1950); *Massa* v. *State*, 37 Ohio App. 532, 175 N.E. 219 (1930); *Licavoli* v. *State*, 20 Ohio Ops. 562, 34 N.E.2d 450 (1935).

The only other line of Ohio cases illuminating the nature of that State's procedures for deciding the question of penalty in a capital case, concerns the proper scope of counsel's arguments. The prosecutor may argue for the death penalty, and defense counsel may argue against it, so long as they do not go outside the record. *Howell* v. *State*, 102 Ohio St. 411, 131 N.E. 706 (1921); *Shelton* v. *State*, 102 Ohio St. 376, 131 N.E. 704 (1921). In *State* v. *Ames*, 50 Ohio Law Abs. 311, 80 N.E.2d 168, 171 (1947), *rehearing denied*, 81 N.E.2d 238 (1948), *app. dism'd*, 149 Ohio St. 192, 78 N.E.2d 48 (1948), the prosecutor was permitted to argue that the defendant should not be sent to the penitentiary to educate young criminals and turn them back on society. Cf. *State* v. *Pierce*, 44 Ohio Law Abs. 193, 62 N.E.2d 270 (1945). In *State* v. *Muskus*, 158 Ohio St. 276, 109 N.E.2d 15 (1952) (reversal upon other grounds), it was held to be improper for him to say that it was a shame to spend the taxpayers' money to try these bums (an argument obviously prejudicial on the guilt issue as well), and that more money should not be spent housing them in the penitentiary. In *State* v. *Watson*, 20 Ohio App.2d 115, 252 N.E.2d 305 (1969) (reversal upon another ground), the court condemned arguments that a death verdict should be returned to "support our police" and "support our way of life," but said that these would not alone constitute reversible error. And see *Turner* v. *State*, 21 Ohio Law Abs. 276 (1936), holding it error for the prosecutor to inform the jury that the court could set aside the jury's death verdict—as, under Ohio law, it cannot.

[42] The trial court may not review it, *Turner* v. *State*, 21 Ohio Law Abs. 276, 279-280 (1936); *State* v. *Klumpp*, 15 Ohio Ops.2d

> "[T]he courts have nothing to do with the sentence in a case of this kind; . . . the Legislature . . . has not only defined the crime . . . but it has also fixed the penalty. When a person is convicted of first degree murder . . ., the Legislature has decreed that such person must die in the electric chair, unless the jury recommends mercy. The Courts have nothing to say as to the punishment; the penalty of death is mandatory and is left squarely with the jury . . . ."[43]

Similarly, the death sentencing decision of a three-judge court, upon a plea of guilty or a jury waiver, is totally unreviewable.[44]

461, 175 N.E.2d 767, 775-776 (1960), *app. dism'd*, 171 Ohio St. 62, 167 N.E.2d 778 (1960); see *State* v. *Ellis*, 98 Ohio St. 21, 120 N.E. 218, 219 (1918) (dictum); nor may an appellate court, *State* v. *Ames*, 50 Ohio Law Abs. 311, 80 N.E.2d 168, 170 (1947), *rehearing denied*, 81 N.E.2d 238 (1948), *app. dism'd*, 149 Ohio St. 192, 78 N.E.2d 48 (1948); *State* v. *Reed*, 85 Ohio App. 36, 84 N.E.2d 620, 624 (1948). In 1963, a bill was introduced in the Ohio Legislature that would have given both trial and appellate courts power to reduce a jury-imposed death sentence, but it died in committee. See Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 WESTERN RESERVE L. REV. 512, 514 (1964).

[43] *State* v. *Klumpp*, 15 Ohio Ops.2d 461, 175 N.E.2d 767, 775 (1960), *app. dism'd*, 171 Ohio St. 62, 167 N.E.2d 778 (1960).

[44] *State* v. *Ferguson*, 175 Ohio St. 390, 195 N.E.2d 794 (1964); *State* v. *Stewart*, 176 Ohio St. 156, 198 N.E.2d 439 (1964); *Hoppe* v. *State*, 29 Ohio App. 467, 163 N.E. 715 (1928); *State* v. *Lucear*, 93 Ohio App. 281, 109 N.E.2d 39 (1952); and see *State* v. *Frohner*, 150 Ohio St. 53, 80 N.E.2d 868 (1948). Of course, where the evidence is legally insufficient to sustain *conviction* of the capital offense, a conviction may be set aside on appeal, and the sentence necessarily falls with it. *State* v. *Porello*, 138 Ohio St. 239, 34 N.E.2d 198 (1941); *State* v. *Cosby*, 100 Ohio App. 459, 137 N.E.2d 282 (1955). Also, apparently, if the *conviction* is against the weight of the evidence, a Court of Appeals may reverse and remand for a new trial, although it may not reduce the degree of

Under the procedures just described, Ohio juries and judges sentence to death less than one-quarter of the persons whom they yearly convict of first-degree murder. In the past decade, the figures have been lower: averaging about 15% death verdicts.[45]

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the offense or direct an acquittal. See *State* v. *Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955) (noncapital case). Also, if the sentencing judge affirmatively states that he is not exercising the sentencing discretion conferred by the law, a sentence will be reversed and remanded with directions to exercise the discretion. *State* v. *Sahadi*, 3 Ohio App.2d 209, 209 N.E.2d 758 (1964) (noncapital case; see note 23, para. 2, *supra*). But once the discretion is exercised, it is unreviewable.

[45] Between 1949 and 1958, it is estimated that there were 217 first-degree murder convictions in Ohio, as compared with 49 death verdicts for first-degree murder. The death-sentencing rate was therefore less than 25%. OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (January, 1961), 54. (It is unclear whether these figures are for jury trials alone or for both jury and bench trials.)

Between 1959 and 1968, the figures for all trials (jury and bench) are as follows:

Year	Number of First-Degree Murder Convictions	Number of Death Sentences Upon Convictions
1959	24	less than 7; exact figure unreported
1960	24	2
1961	27	5
1962	33	3
1963	23	2
1964	34	6
1965	42	8
1966	38	5
1967	45	9
1968	58	10
Total	348	54

The sources of the ten conviction figures, respectively, are: OHIO DEPARTMENT OF MENTAL HYGIENE AND CORRECTIONS, OHIO JUDICIAL

2. *California*[46]

In California, as in Ohio, juries have virtually no role in non-capital sentencing,[47] but are the principal sentencing

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CRIMINAL STATISTICS [hereafter cited as OJCS], 1959, p. 12; OJCS, 1960, p. 8; OJCS, 1961, p. 12; OJCS, 1962, p. 9; OJCS, 1963, p. 13; OJCS, 1964, p. 8; OJCS, 1965, p. 11; OJCS, 1966, p. 9; OJCS, 1967, p. 9; OJCS, 1968, p. 11.

The sources of the ten death-sentence figures, respectively, are: UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS [hereafter cited as NPS] Bulletin No. 23, Executions 1959 (February, 1960), p. 1; NPS Bulletin No. 26, Executions 1960 (March, 1961), table 5; NPS Bulletin No. 28, Executions 1961 (April, 1962), table 5; NPS Bulletin No. 32, Executions 1962 (April, 1963), table 5; NPS Bulletin No. 34, Executions 1930-1963 (May, 1964), p. 14; NPS Bulletin No. 37, Executions 1930-1964 (April, 1964 [sic: 1965]), p. 14; NPS Bulletin No. 39, Executions 1930-1965 (June, 1966), p. 14; NPS Bulletin No. 41, Executions 1930-1966 (April 1967), p. 13; NPS Bulletin No. 42, Executions 1930-1967 (June, 1968), p. 16; NPS Bulletin No. 45, Capital Punishment 1930-1968 (August, 1969), p. 16.

These two sets of figures appear to be reliably comparable. (See the discussion in Appendix B to our *Maxwell* brief, Appendix A *infra*, pp. 24a-26a.) The OJCS figures cover only 87 of Ohio's 88 counties, while the NPS figures cover all 88; but the missing OJCS county is a small one (accounting for less than 1% of the State's population), and likely insignificant for present purposes. Since the NPS figures are for prisoners *received at prison* under sentence of death, and since prisoners are not always received in the same year in which they are convicted, there may be a degree of non-comparability between the OJCS and NPS figures for any single year; but this would balance out over a ten-year span.

[46] California capital trial practice is discussed in *Note, A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297, 1311-1315 (1969); *Comment, The Death Penalty Cases*, 56 CAL. L. REV. 1268, 1366-1369, 1404-1415, 1420-1422, 1424-1434 (1968); *Comment, The California Penalty Trial*, 52 CAL. L. REV. 386 (1964); *Symposium Note, The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50 (1964).

[47] 2 WITKIN, CALIFORNIA CRIMES, §§904-905 (1963), at pp. 859-860. The jury's only function in non-capital sentencing relates to a few crimes classified as "misdemeanor-felonies," which the jury may determine to be the former or the latter. The judge exercises all other sentencing power. *Ibid.* However, if he imposes a state-

agency in capital cases. California has one mandatory capital statute in active (albeit relatively infrequent) use,[48] and maintains a few obsolete ones on the books;[49] otherwise, its capital laws confer the choice of death or imprisonment upon the jury.[50] Juries make this sentencing choice whether the defendant pleads guilty or not guilty,[51] unless, with

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prison sentence, he does not fix the maximum term; that is later fixed by the Adult Authority. Cal. Pen. Code §§1168, 1168a, 5077.

[48] Cal. Pen. Code §4500 (assault with a deadly weapon or any means likely to cause great bodily injury by a prisoner under sentence of life imprisonment, where the person assaulted is not an inmate and dies). See note 19, para. 1, *supra*.

[49] These are treason (Cal. Pen. Code §37), train wrecking where any person suffers bodily harm (Cal. Pen. Code §219), and—that most astounding of capital offenses, which simultaneously admits the fallibility of human judicial process and attaches irremediable consequences to it—the capital crime of procuring the execution of an innocent man by perjury in a capital case (Cal. Pen. Code §128).

[50] Cal. Pen. Code §190 (first degree murder; death or imprisonment "at the discretion of the court or jury trying the same"); Cal. Pen. Code §209 (kidnapping for ransom or robbery where the kidnapped person suffers bodily harm; death or imprisonment "at the discretion of the jury trying the same"); Cal. Pen. Code §219 (train wrecking where no person suffers bodily harm; death or imprisonment "at the option of the jury trying the case"); Cal. Pen. Code §4500 (assault with a deadly weapon or any means likely to cause great bodily injury by a prisoner under sentence of life imprisonment, where the person assaulted is an inmate or does not die; death or imprisonment "at the discretion of the court or jury trying the same"); Cal. Mil. & Vet. Code §§1670, 1672(a) (sabotage causing death or great bodily injury; death or imprisonment "at the discretion of the jury trying the case, or at the discretion of the court where a jury does not try the case"). Notes 51-53 *infra* explain why these statutes envisage principally jury sentencing; bench sentencing, as will appear, is authorized only upon a waiver of jury trial.

[51] Cal. Pen. Code §190.1, set out in notes 56-7 *infra*, governs the sentencing procedure under all five non-mandatory capital statutes collected in note 50 *supra*. Its second paragraph provides explicitly that if a defendant is convicted upon a plea of guilty, a jury shall determine sentence unless a jury is waived. (Compare the Ohio practice described at note 27 *supra*.) For instances

consent of the prosecution, a jury is waived.[52] Upon a waiver, a single judge exercises the jury's sentencing power.[53]

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of jury sentencing upon a guilty plea, see, e.g., *People* v. *Baldonado*, 53 Cal.2d 824, 350 P.2d 115, 3 Cal. Rptr. 363 (1960); *People* v. *Seiterle*, 56 Cal.2d 320, 363 P.2d 913, 14 Cal. Rptr. 681 (1961).

[52] Cal. Const., Art. I, §7 provides both that criminal defendants have a right to trial by jury, and that they may waive that right only with the prosecutor's consent. The California courts hold that consent of the prosecutor is required for a waiver of jury trial both upon the trial of guilt, *People* v. *Washington*, —— Cal. 2d ——, 458 P.2d 479, 493-494, 80 Cal. Rptr. 567 (1969); *People* v. *Whitmore*, 251 Cal. App.2d 359, 59 Cal. Rptr. 411, 415 (1967), and upon the trial of penalty after guilt has been determined, *People* v. *King*, 1 Cal.3d 791, 463 P.2d 753, 83 Cal. Rptr. 401 (1970).

For instances of judicial sentencing upon a jury waiver after a plea of guilty, see, e.g., *People* v. *Deptula*, 58 Cal.2d 225, 373 P.2d 430, 23 Cal. Rptr. 366 (1962); *People* v. *Massie*, 66 Cal.2d 899, 428 P.2d 869, 59 Cal. Rptr. 733 (1967). For instances of judicial sentencing following a bench trial upon a jury waiver at trial on a plea of not guilty, see, e.g., *People* v. *Lookado*, 66 Cal.2d 307, 425 P.2d 208, 57 Cal. Rptr. 608 (1967); *People* v. *Aikens*, 70 Cal.2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969); cf. *People* v. *Reeves*, 64 Cal.2d 766, 415 P.2d 35, 51 Cal. Rptr. 691 (1966) (plea of not guilty by reason of insanity). Where a capital defendant thus waives a jury for trial of the issue of guilt, sentencing must be done by a judge; a jury may not be impaneled only for sentencing. Cal. Pen. Code §190.1, notes 56-7 *infra*, as construed in *People* v. *Golston*, 58 Cal.2d 535, 375 P.2d 51, 25 Cal. Rptr. 83 (1962). The same statute seems to say, conversely, that if jury trial is had upon the issue of guilt, sentencing must be done by the jury; however, there is at least one reported instance of a jury-trial waiver as to penalty following a jury's determination of guilt, *People* v. *Sosa*, 251 Cal. App.2d 9, 58 Cal. Rptr. 912 (1967), apparently with the prosecutor's consent, see note 51 *supra*. Cf. *People* v. *Jackson*, 67 Cal.2d 96, 429 P.2d 600, 60 Cal. Rptr. 248 (1967) (jury waiver at penalty trial following appellate reversal and remand as to penalty alone).

[53] See, e.g., *People* v. *Jones*, 52 Cal.2d 636, 343 P.2d 577, 585 (1959); *People* v. *Langdon*, 52 Cal.2d 425, 341 P.2d 303, 308 (1959).

That power, which was originally conferred in murder cases in 1874,[54] is now expressed by essentially similar terminology in all of California's five non-mandatory capital statutes.[55] The first-degree murder statute, Cal. Pen. Code §190, involved in the present *McGautha* case, is typical:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1 . . . ."

Section 190.1, enacted in 1957,[56] establishes a bifurcated or "split-trial" procedure for the trial of capital cases, providing, in pertinent part:

> "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has

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[54] Cal. Acts Amendatory of the Codes 1873-1874, ch. 508, §1, p. 457.

[55] See note 50 *supra*.

[56] Cal. Stats. 1957, ch. 1968, §2, p. 3509. A 1959 amendment, Cal. Stats. 1959, ch. 738, §1, p. 2727, dealt primarily with the manner of trial in capital cases where the defense of insanity was raised. California has long provided for separate trials of the issues of guilt and sanity in all criminal cases, Cal. Pen. Code §1026; and the 1959 amendment to §190.1 made clear that, on pleas of not guilty and not guilty by reason of insanity to a capital crime, the issues of guilt, sanity and penalty were to be separately tried, in that order. The only other change made by the amendment was deletion of a paragraph in the 1957 statute which had provided that evidence admissible at the guilt trial was also admissible at the penalty trial. This deletion has been given no effect by the California courts. Compare *People* v. *Glatman*, 52 Cal.2d 283, 340 P.2d 8 (1959), and *People* v. *Jones*, 52 Cal.2d 636, 343 P.2d 577 (1959), with *People* v. *Tahl*, 65 Cal.2d 719, 423 P.2d 246, 251, 56 Cal. Rptr. 318 (1967).

been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of said person shall be upon the defendant." [57]

The statutory penalty trial is ordinarily conducted before the same jury that has determined the defendant's guilt.[58]

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[57] The balance of the section consists of two paragraphs, as follows:

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which the defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

[58] Section 190.1, para. 2, *supra* note 57, permits the trial judge to convene a new jury for the penalty phase "for good cause

Evidence may be presented relating to the circumstances of the offense,[59] the defendant's attitudes toward it,[60] his mental characteristics,[61] life history,[62] crimes and other anti-social behavior,[63] and other matters.[64] Although the

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shown." California decisions interpret this provision as expressing a preference for retaining the same jury that determined guilt, if practicable. E.g., *People* v. *Gilbert*, 63 Cal.2d 690, 408 P.2d 365, 378, 47 Cal. Rptr. 909 (1966); *People* v. *Gonzales*, 66 Cal.2d 482, 426 P.2d 929, 939-940, 58 Cal. Rptr. 361 (1967).

[59] E.g., *People* v. *Talbot*, 64 Cal.2d 691, 414 P.2d 633, 643-644, 51 Cal. Rptr. 417 (1966); *People* v. *Floyd*, 1 Cal.3d 694, 464 P.2d 64, 79, 83 Cal. Rptr. 608 (1970).

[60] E.g., *People* v. *Corwin*, 52 Cal.2d 404, 340 P.2d 626, 627 (1959); *People* v. *Jacobson*, 63 Cal.2d 319, 405 P.2d 555, 563-564, 46 Cal. Rptr. 515 (1965); *People* v. *Talbot*, 64 Cal.2d 691, 414 P.2d 633, 647, 51 Cal. Rptr. 417 (1966).

[61] E.g., *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705, 713-714, 3 Cal. Rptr. 665 (1960); *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 429-431, 16 Cal. Rptr. 370 (1961); *People* v. *Bickley*, 57 Cal. 2d 788, 372 P.2d 100, 102-103, 22 Cal. Rptr. 340 (1962); *People* v. *Jackson*, 59 Cal.2d 375, 379 P.2d 937, 940, 29 Cal. Rptr. 505 (1963).

[62] E.g., *People* v. *Feldkamp*, 51 Cal.2d 237, 331 P.2d 632, 633-634 (1958); *People* v. *Corwin*, 52 Cal.2d 404, 340 P.2d 626, 627 (1959); *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705, 713-714, 3 Cal. Rptr. 665 (1960); *People* v. *Pike*, 58 Cal.2d 70, 372 P.2d 656, 670, 22 Cal. Rptr. 664 (1962).

[63] Evidence of other crimes is broadly admissible, e.g., *People* v. *Ketchel*, 59 Cal.2d 503, 381 P.2d 394, 415-416, 30 Cal. Rptr. 538 (1963); *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 385-386, 37 Cal. Rptr. 605 (1964); *People* v. *Hillery*, 65 Cal.2d 795, 423 P.2d 208, 214, 56 Cal. Rptr. 280 (1967), without regard to the nature of the crimes, e.g., *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705, 711, 3 Cal. Rptr. 665 (1960) (possession of firearms, constituting a parole violation); *People* v. *Pike*, 58 Cal.2d 70, 372 P.2d 656, 670, 22 Cal. Rptr. 664 (1962) (pimping); *People* v. *Durham*, 70 Cal.2d 171, 449 P.2d 198, 210, 212-214, 74 Cal. Rptr. 262 (1969) (sodomy). Because the purpose of this evidence is to show the defendant's character, the jury need not be concerned with the technical elements of the crimes. *People* v. *Tahl*, 65 Cal.2d 719, 423 P.2d 246, 257-258, 56 Cal. Rptr. 318 (1967). Juvenile offenses, *People* v.

California Supreme Court has declared a few areas of

Reeves, 64 Cal.2d 766, 415 P.2d 35, 40-41, 51 Cal. Rptr. 691 (1966), and misbehavior of various sorts, e.g., *People* v. *Lindsey*, 56 Cal.2d 324, 363 P.2d 910, 911, 14 Cal. Rptr. 678 (1961); *People* v. *Lopez*, 60 Cal.2d 223, 384 P.2d 16, 34, 32 Cal. Rptr. 424 (1963); *People* v. *Mathis*, 63 Cal.2d 416, 406 P.2d 65, 71-73, 46 Cal. Rptr. 785 (1965); *People* v. *Risenhoover*, 70 Cal.2d 39, 447 P.2d 925, 935, 73 Cal. Rptr. 533 (1968), may be shown. It does not matter that the defendant was never prosecuted for the offenses, *People* v. *Mitchell*, 63 Cal.2d 805, 409 P.2d 211, 218-219, 48 Cal. Rptr. 371 (1966); *People* v. *Aikens*, 70 Cal.2d 369, 450 P.2d 258, 260, 74 Cal. Rptr. 882 (1969); or even that he has been tried and acquitted of them, *People* v. *Griffin*, 60 Cal.2d 182, 383 P.2d 432, 436-437, 32 Cal. Rptr. 24 (1963), *rev'd on other grounds*, 380 U.S. 609 (1965); *People* v. *Vaughn*, —— Cal.3d ——, 455 P.2d 122, 130, 78 Cal. Rptr. 186 (1969). If he was previously convicted, the offense may nonetheless be established by direct testimony *dehors* the earlier record. *People* v. *Purvis*, 52 Cal.2d 871, 346 P.2d 22, 27-28 (1959); *People* v. *Durham*, 70 Cal.2d 171, 449 P.2d 198, 212-214, 74 Cal. Rptr. 262 (1969).

The jury must be instructed that, before it may consider other crimes in aggravation, they are required to be proved beyond a reasonable doubt. E.g., *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 389 n. 8, 37 Cal. Rptr. 605 (1964); *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 645-646, 47 Cal. Rptr. 1 (1965); *People* v. *Tahl*, 65 Cal.2d 719, 423 P.2d 246, 257, 56 Cal. Rptr. 318 (1967) (dictum). See CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC) 8.81 (Third rev. ed. 1970), p. 259. Corollaries of this rule are that confessional evidence of other offenses may not be received until the *corpus delicti* has been established *aliunde*, e.g., *People* v. *Hamilton*, 60 Cal.2d 105, 383 P.2d 412, 426-427, 32 Cal. Rptr. 4 (1963); *People* v. *Hines*, 61 Cal.2d 164, 390 P.2d 398, 405, 37 Cal. Rptr. 622 (1964); *People* v. *Clark*, 62 Cal.2d 870, 402 P.2d 856, 861-862, 44 Cal. Rptr. 784 (1965); and that the offenses may not be proved by the uncorroborated testimony of accomplices, *People* v. *Varnum*, 66 Cal.2d 808, 427 P.2d 772, 777, 59 Cal. Reptr. 108 (1967); *People* v. *McClellan*, —— Cal.3d ——, 457 P.2d 871, 877-880, 80 Cal. Rptr. 31 (1969).

[64] E.g., *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705, 711, 3 Cal. Rptr. 665 (1960) (dictum) (defendant's statement that he wanted to die, as indicating consciousness of guilt); *People* v. *Tahl*, 65 Cal.2d 719, 423 P.2d 246, 255-256, 56 Cal. Rptr. 318 (1967) (defendant's statement that he planned to commit another killing, as showing no remorse); *People* v. *Modesto*, 59 Cal.2d 722, 382 P.2d 33, 40-41, 31 Cal. Rptr. 225 (1963) (good character of victims).

inquiry improper,[85] the range of evidence[86] is exceedingly

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[85] These rulings are based upon the conception that certain issues are impracticable to litigate, or unduly inflammatory, rather than that they are irrelevant. The rulings therefore bespeak no limitation of the considerations that may move the jury in its undirected and unfettered sentencing choice, see notes 83-88 *infra*.

First, the California Supreme Court has thought it impracticable to permit litigation in penalty trials of issues going to the basic question whether capital punishment should ever be used as a criminal penalty. It has regarded that question as foreclosed by the legislative decision to use it. E.g., *People* v. *Moya*, 53 Cal.2d 819, 350 P.2d 112, 114, 3 Cal. Rptr. 360 (1960); *People* v. *Love*, 56 Cal.2d 720, 366 P.2d 33, 35, 809, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481 (1961); *People* v. *Kidd*, 56 Cal.2d 759, 366 P.2d 49, 16 Cal. Rptr. 793 (1961).

Second, on basically similar grounds, the Court has closed off trial of the question whether capital punishment has any deterrent efficacy. All evidence, argument and jury instruction concerning deterrence are forbidden. E.g., *People* v. *Love*, 56 Cal.2d 720, 366 P.2d 33, 35, 37-40, 809, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481 (1961); *People* v. *Kidd*, 56 Cal.2d 759, 366 P.2d 49, 55-56, 16 Cal. Rptr. 793 (1961); *People* v. *Lane*, 56 Cal.2d 773, 366 P.2d 57, 65, 16 Cal. Rptr. 801 (1961); *People* v. *Terry*, 57 Cal.2d 538, 370 P.2d 985, 1003-1004, 21 Cal. Rptr. 185 (1962); *People* v. *Bickley*, 57 Cal.2d 788, 372 P.2d 100, 103-107, 22 Cal. Rptr. 340 (1962); *People* v. *Ketchel*, 59 Cal.2d 503, 381 P.2d 394, 412-414, 30 Cal. Rptr. 538 (1963); and see *People* v. *Purvis*, 60 Cal.2d 323, 384 P.2d 424, 435-436, 33 Cal. Rptr. 104 (1963). However, the prosecution can usually make some reference to deterrence and escape reversal under the harmless error doctrine, provided that the reference is not too emphatic. E.g., *People* v. *Garner*, 57 Cal.2d 135, 367 P.2d 680, 692-693, 18 Cal. Rptr. 40 (1961); *People* v. *Imbler*, 57 Cal.2d 711, 371 P.2d 304, 308, 21 Cal. Rptr. 568 (1962); *People* v. *Pike*, 58 Cal.2d 70, 372 P.2d 656, 670-672, 22 Cal. Rptr. 664 (1962); and see *People* v. *Welch*, 58 Cal.2d 271, 373 P.2d 427-429, 23 Cal. Rptr. 363 (1962) (bench trial).

Third, since 1964, no evidence or argument is permitted concerning the likelihood of parole from a sentence of life imprisonment. That matter—considered impracticably speculative—is now governed by a standard jury instruction. *People* v. *Morse*, 60 Cal.2d 631, 388 P.2d 33, 36-44, 36 Cal. Rptr. 201 (1964); see, e.g., *People* v. *Varnum*, 61 Cal.2d 425, 392 P.2d 961, 962-963, 38 Cal. Rptr. 881 (1964); *People* v. *Hillery*, 62 Cal.2d 692, 401 P.2d 382, 395, 44 Cal. Rptr. 30 (1965); *People* v. *Anderson*, 63 Cal.2d 351,

broad[67] and—because of the limitless discretion conferred upon the jury[68]—extraordinarily nebulous.[69]

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406 P.2d 43, 54; 46 Cal. Rptr. 763 (1965); and see CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC) 8.82 (Third rev. ed. 1970), pp. 260-261.

Fourth, it is unclear to what extent evidence of the defendant's likely recidivism—considered without regard to the likelihood of his release on parole from a sentence of life imprisonment—is admissible. The prosecution may apparently present psychiatric evidence that the defendant is not capable of being rehabilitated. *People* v. *Bickley*, 57 Cal.2d 788, 372 P.2d 100, 102-103, 22 Cal. Rptr. 340 (1962). It may not present recidivism records of other non-homicidal criminals, *People* v. *Purvis*, 52 Cal.2d 871, 346 P. 2d 22, 30-31 (1959), perhaps only because these are non-probative of the likely recidivism of a homicide defendant. See note 66 *infra*. Perhaps, since the likelihood of recidivism in fact depends upon the likelihood of release on parole, this whole area is now off limits under the principles of the preceding paragraph.

Fifth, proof of unintended physical suffering by the victim may not be made, *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705, 711-713, 3 Cal. Rptr. 665 (1960), apparently because it would be unduly inflammatory. The *Love* opinion also suggests an alternative ground for the rule: that retribution alone is not a proper concern of the sentencing jury. But some kinds of evidence apparently relevant only to retributive concerns are admissible (see the *Modesto* case in note 64 *supra*); and it appears that prosecutorial argument of retributive concerns, among others, will not be condemned. See *People* v. *Floyd*, 1 Cal.3d 694, 464 P.2d 64, 81-82, 83 Cal. Rptr. 608 (1970).

[66] Matters presented at the penalty trial must be proved in a fashion that conforms to the ordinary rules of evidentiary competency: rules of hearsay, of connecting-up, etc. E.g., *People* v. *Terry*, 57 Cal.2d 538, 370 P.2d 985, 1001-1002, 21 Cal. Rptr. 185 (1962); *People* v. *Hamilton*, 60 Cal.2d 105, 383 P.2d 412, 426-429, 32 Cal. Rptr. 4 (1963); *People* v. *Hill*, 66 Cal.2d 536, 426 P.2d 908, 929, 58 Cal. Rptr. 340 (1967); *People* v. *Nye*, —— Cal.3d ——, 455 P.2d 395, 404, 78 Cal. Rptr. 467 (1969).

[67] E.g., *People* v. *Jones*, 52 Cal.2d 636, 343 P.2d 577, 584 (1959); *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 385-386, 37 Cal. Rptr. 605 (1964).

[68] See notes 83-88 *infra*.

[69] See *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 384, 37 Cal. Rptr. 605 (1964):

(footnote continued on next page)

At the conclusion of arguments, by counsel,[70] the jury is instructed, generally: (1) that they are to consider all of

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"The case raises another aspect of the almost insoluble difficulty of defining the purpose, function and content of the penalty trial in capital cases. We have previously pointed out that the Legislature fixed no standards for the guidance of the jury in determining whether a defendant should suffer the penalty of life imprisonment or death, and to that extent left the function of the jury in a somewhat nebulous state. (People v. Morse, 60 A.C. 613, 36 Cal. Rptr. 201, 388 P.2d 33.) We now face the further fact that the Legislature did not clearly define the scope of the penalty trial; we must determine what kind of evidence is admissible at such a trial and fix the limits, if any, of this legislatively unchartered enquiry."

See also *People* v. *Hines*, 61 Cal.2d 164, 390 P.2d 398, 402, 37 Cal. Rptr. 622 (1964):

"The isolation of the determination of the death penalty in the penalty trial, which proceeds without standards for the jury, plus the expansion of the subject-matter of the trial, which has reached very wide margins, gives to the jury an undefined task performed upon a showing of a mass of material. As a result the jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner."

[70] Since *People* v. *Bandhauer*, 66 Cal.2d 524, 426 P.2d 900, 904-905, 58 Cal. Rptr. 332 (1967), the practice has been that the prosecutor opens the penalty arguments and the defendant closes them. The earlier practice of permitting the prosecutor to open and close was abandoned (prospectively) in *Bandhauer* as less consistent with "the Legislature's strict neutrality" concerning the jury's choice of life or death. *Id.*, 426 P.2d, at 905.

California decisions concerning the scope of argument by counsel do not illuminate or delimit the factors which may determine that life-or-death choice. Briefly:

First, argument, like evidence, may not attack the basic question of propriety of the legislative decision to allow the death penalty. See note 65, para. *First, supra*. Defense counsel may not, for example, argue that it is immoral in any case to con-

demn a man to die. *People* v. *Shipp*, 59 Cal.2d 845, 382 P.2d 577, 582, 31 Cal. Rptr. 457 (1963).

Second, as indicated in note 65, paras. *Second* and *Third*, *supra*, argument may not be addressed to considerations of deterrence or the likelihood of parole in the event of a life sentence. Nor may speculation be invited concerning the possibility that the defendant may escape from prison if sentenced to life. *People* v. *White*, 69 Cal.2d 751, 446 P.2d 993, 998, 72 Cal. Rptr. 873 (1968). On the other hand, somewhat inconsistently, the prosecutor is permitted to argue that the defendant is not rehabilitatable. *People* v. *Spencer*, 60 Cal.2d 64, 383 P.2d 134, 151, 31 Cal. Rptr. 782 (1963); *People* v. *Talbot*, 64 Cal.2d 691, 414 P.2d 633, 646-647, 51 Cal. Rptr. 417 (1966).

Third, no mention may be made of the trial court's power to set aside a death verdict (see note 89 *infra*), of the Governor's power of pardon or commutation, or of the possibility of appeal. *People* v. *Linden*, 52 Cal.2d 1, 338 P.2d 397, 410 (1959); *People* v. *Morse*, 60 Cal.2d 631, 388 P.2d 33, 44-47, 36 Cal. Rptr. 201 (1964); cf. *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 385, 37 Cal. Rptr. 605 (1964) (forbidding instructions of the same sort).

Fourth, argument that is based upon factual matters must be kept to the facts of record. *People* v. *Love*, 56 Cal.2d 720, 366 P. 2d 33, 37-40, 809, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481 (1961). Argument from facts not in evidence is improper. *People* v. *Terry*, 57 Cal.2d 538, 370 P.2d 985, 1002-1003, 21 Cal. Rptr. 185 (1962) (pre-*Morse* case dealing with parole possibilities); *People* v. *Bandhauer*, 66 Cal.2d 524, 426 P.2d 900, 903-904, 58 Cal. Rptr. 332 (1967).

Fifth, other purely inflammatory argument is forbidden, see note 65, para. *Fifth*, *supra*. But the prosecutor may indulge in damning characterizations supported by the evidence, e.g., *People* v. *Gonzales*, 56 Cal.2d 317, 363 P.2d 871, 873, 14 Cal. Rptr. 639 (1961) ("sex perversion cases"); *People* v. *Ketchel*, 59 Cal.2d 503, 381 P.2d 394, 414-415, 30 Cal. Rptr. 538 (1963) ("cop killer"); *People* v. *Lopez*, 60 Cal.2d 223, 384 P.2d 16, 32-33, 32 Cal. Rptr. 424 (1963) ("cold-blooded killers" who would dance on their victim's grave); *People* v. *Mitchell*, 63 Cal.2d 805, 409 P.2d 211, 213-214, 48 Cal. Rptr. 371 (1966) ("professional robber"); *People* v. *Thomas*, 65 Cal.2d 698, 423 P.2d 233, 239, 56 Cal. Rptr. 305 (1967) ("a regular smart aleck"); and he may, for example, invite the jury to use the death penalty as a form of justifiable homicide. *People* v. *Tahl*, 65 Cal.2d 719, 423 P.2d 246, 262, 56 Cal. Rptr. 318 (1967).

Concerning the general scope of allowable argument and some examples, see *People* v. *Griffin*, 60 Cal.2d 182, 383 P.2d 432, 437-438, 32 Cal. Rptr. 24 (1963), *rev'd on other grounds*, 380 U.S.

the evidence;[11] (2) but that they need not find mitigating circumstances in order to spare the defendant, nor aggravating circumstances in order to condemn him,[12] since the Legislature has expressed no preference between the penalties of life and death,[13] leaving that matter in the absolute discretion of the jury[14] without standards or criteria of any kind.[15] The form instruction now in common

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609 (1965); *People* v. *Talbot*, 64 Cal.2d 691, 414 P.2d 633, 646-647, 51 Cal. Rptr. 417 (1966); *People* v. *Hill*, 66 Cal.2d 536, 426 P.2d 908, 924-927, 58 Cal. Rptr. 340 (1967).

[11] *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 432, 16 Cal. Rptr. 370 (1961); *People* v. *Hillery*, 65 Cal.2d 795, 423 P.2d 208, 215, 56 Cal. Rptr. 280 (1967).

[12] *People* v. *Green*, 47 Cal.2d 209, 302 P.2d 307, 313-314, 317 (1956); *People* v. *Friend*, 47 Cal.2d 749, 306 P.2d 463, 466-472 (1957); *People* v. *Harrison*, 59 Cal.2d 622, 381 P.2d 665, 670-671, 30 Cal. Rptr. 841 (1963); *People* v. *Washington*, —— Cal.2d ——, 458 P.2d 479, 500, 80 Cal. Rptr. 567 (1969); and see *In re Anderson*, 69 Cal.2d 613, 447 P.2d 117, 124, 73 Cal. Rptr. 21 (1968).

[13] See *People* v. *Green*, note 72 *supra*, 302 P.2d, at 314, 322; *People* v. *Friend*, note 72 *supra*, 306 P.2d, at 469; *People* v. *Washington*, note 72 *supra*, 458 P.2d, at 500; *People* v. *Purvis*, 56 Cal. 2d 93, 362 P.2d 713, 715, 13 Cal. Rptr. 801 (1961); *People* v. *Hamilton*, 60 Cal.2d 105, 383 P.2d 412, 429, 32 Cal. Rptr. 4 (1963).

[14] E.g., *People* v. *Lane*, 56 Cal.2d 773, 366 P.2d 57, 65, 16 Cal. Rptr. 801 (1961) ("The court correctly instructed the jury that the fixing of the penalty at death or life imprisonment was in their 'absolute discretion'. . . ."); *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 432, 16 Cal. Rptr. 370 (1961) (approving instruction that in "'determining which punishment shall be inflicted, you are entirely free to act according to your own judgment and absolute discretion'. . . ."). See notes 83-88 *infra*.

[15] *People* v. *Linden*, 52 Cal.2d 1, 338 P.2d 397, 409 n. 5 (1959) (approving instructions that "'Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty but rather commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and discretion of the

use for this purpose, colloquially known as CALJIC 8.80, runs as follows:[76]

> "The defendant[s] in this case [has] [have] been found guilty of the offense of murder in the first degree. It is now your duty to determine which of the penalties provided by law should be imposed [on each defendant] for that offense. In arriving at this determination you should consider all of the evidence received here in court presented by the People and defendant[s] throughout the trial before this jury. You may also consider all of the evidence of the circumstances on the one hand or evidence in aggravadant's [each defendant's] background and history, and of the facts in aggravation or mitigation of the penalty which has been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggrevation of the offense on the other.
>
> "It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should fix the penalty as death, you will so indicate in your verdict. Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which

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jury'. . . .'"); *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 432, 16 Cal. Rptr. 370 (1961) (approving instruction that "'the law does not prescribe, nor authorize the Court to innovate, any rule circumscribing the exercise of your discretion, but, rather, commits the whole matter of its exercise to the judgment and consciences of the jury.'"). And see *People* v. *Friend*, 47 Cal.2d 749, 306 P.2d 463, 473 (1957); *People* v. *Hines*, 61 Cal.2d 164, 390 P.2d 398, 401, 37 Cal. Rptr. 622 (1964). See also notes 85-88 *infra*.

[76] CALIFORNIA JURY INSTRUCTIONS, CRIMINAL [CALJIC] 8.80 (Third rev. ed. 1970), pp. 257-258.

punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience and absolute discretion. That verdict must express the individual opinion of each juror.

"Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed."

CALJIC 8.80 has been expressly approved by the California Supreme Court,[11] as have other[12] and more elaborate[13] fashions of expressing the jury's entirely unguided

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[11] *People* v. *Nye*, —— Cal.3d ——, 455 P.2d 395, 402 n. 5, 78 Cal. Rptr. 467 (1969). See also *People* v. *Durham*, 70 Cal.2d 171, 449 P.2d 198, 215-216, 74 Cal. Rptr. 262 (1969), approving CALJIC 8.80 (then designated CALJIC 306.1 (New)), when given in conjunction with present CALJIC 1.30 (then designated CALJIC 11 (New)), which, as a part of the court's basic, general criminal charge, informs the jury that its power to determine the facts and weigh the evidence "is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you." Of course, at the penalty phase of the trial, no "rules of law" are stated, and CALJIC 8.80 denies that they exist.

[12] *People* v. *Linden*, 52 Cal.2d 1, 338 P.2d 397, 409 n. 5 (1959); *People* v. *Lane*, 56 Cal.2d 773, 366 P.2d 57, 65, 16 Cal. Rptr. 801 (1961); *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 432, 16 Cal. Rptr. 370 (1961); *People* v. *Hillery*, 65 Cal.2d 795, 423 P.2d 208, 215, 56 Cal. Rptr. 280 (1967); *People* v. *Washington*, —— Cal.2d ——, 458 P.2d 479, 500, 80 Cal. Rptr. 567 (1969). (It is unclear, in each of these cases, whether the entire substance of the trial court's charge is set forth in appellate opinion.)

[13] *People* v. *Friend*, 47 Cal.2d 749, 306 P.2d 463, 474-475 (1957); *People* v. *Lane*, 56 Cal.2d 773, 366 P.2d 57, 65, 16 Cal. Rptr. 801 (1961); *People* v. *Harrison*, 59 Cal.2d 622, 381 P.2d 665, 670-671, 30 Cal. Rptr. 841 (1963).

and unlimited discretion.[80] That court has said that California trial judges are permitted to "aid the jury by stating the kinds of factors that may be considered [in the penalty determination], thereby setting the tone for the jury's deliberation."[81] But they are not required to give any instruction of this sort;[82] and, where stated at all, the

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[80] See, e.g., *People* v. *Brawley*, 1 Cal.3d 277, 461 P.2d 361, 374-375, 82 Cal. Rptr. 161 (1969), finding no error in the trial court's refusal to tell the jury that its sentencing decision must be rational, where the judge charged that the jury's discretion was absolute, and that it should give dispassionate consideration and a just verdict in the case.

[81] *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 646, 47 Cal. Rptr. 1 (1965). Where such factors are stated, it is usually in the language of the opinion in *People* v. *Friend*, note 79 *supra*, 306 P.2d at 474-475:

> "... that in deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the considerations of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, human passion, ignorance or weakness, or (if appropriate under the evidence, of illness or intoxication or provocation not sufficient to reduce the degree or class of the crime), of the presumptions concerning, or possible uncertainties attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important."

See the *Lane* and *Harrison* cases, note 79 *supra*.

[82] *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 647, 47 Cal. Rptr. 1 (1965):

> "Finally, defendants contend that the trial court must instruct on the legal considerations that the jury should take into account when deciding whether the penalty should be death or life imprisonment. We do not agree that such an

"factors" in question are to be stated in a form that tells the jurors "it is within their discretion alone to determine, each for himself, how far he will accord weight" to each

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instruction is compulsory. The Legislature has entrusted to the absolute discretion of the jury the awesome decision between life imprisonment and the death penalty in first degree murder cases. (Pen. Code, §190; People v. Green, 47 Cal.2d 209, 218, 302 P.2d 307.) The Legislature has thus indicated its belief that jurors understand the factors that are relevant to such a decision. Recitation of such factors by the trial court is therefore not essential. The trial court, may, however, properly aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation."

See also *People* v. *Hillery*, 65 Cal.2d 795, 423 P.2d 208, 215, 56 Cal. Rptr. 280 (1967); *People* v. *Nye*, —— Cal.3d ——, 455 P.2d 395, 401-403, 78 Cal. Rptr. 467 (1969). The ordinary requirement that, where requested, the court must charge upon the defendant's theories relative to every issue in the case is inapplicable to death-penalty proceedings, where the only "issue is whether, under all of the evidence, the jury will choose one penalty or the other." *People* v. *Clark*, 62 Cal.2d 870, 402 P.2d 856, 867, 44 Cal. Rptr. 784 (1965).

So, although it is error to instruct the jurors that they may not be moved by sympathy for the defendant, *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 646, 47 Cal. Rptr. 1 (1965); *People* v. *Vaughn*, —— Cal.3d ——, 455 P.2d 122, 131, 78 Cal. Rptr. 186 (1969); *People* v. *Stanworth*, —— Cal.3d ——, 457 P.2d 889, 904, 80 Cal. Rptr. 49 (1969); *People* v. *Bandhauer*, 1 Cal.3d 609, 463 P.2d 408, 416, 83 Cal. Rptr. 184 (1970), it is not error to decline to instruct that they *may* be so moved. *People* v. *Anderson*, 64 Cal.2d 633, 414 P.2d 366, 371-372, 51 Cal. Rptr. 238 (1966); *People* v. *Hillery*, 65 Cal.2d 795, 423 P.2d 208, 215, 56 Cal. Rptr. 280 (1967); *People* v. *Durham*, 70 Cal.2d 171, 449 P.2d 198, 216, 74 Cal. Rptr. 262 (1969); *People* v. *Washington*, —— Cal.2d ——, 458 P.2d 479, 499-500, 80 Cal. Rptr. 567 (1969). The court can mention this matter (see note 81, *supra*) or not, as it chooses. Similarly, it is error to tell the jurors that they may not consider possible doubts concerning the defendant's guilt, *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 387, 388, 37 Cal. Rptr. 605 (1964); the court can mention such doubts as a mitigating factor (note 81, *supra*), but it need not do so, *People* v. *Washington*, —— Cal.2d ——, 458 P.2d 479, 500, 80 Cal. Rptr. 567 (1969).

of a series of vague considerations.[83] What is essential, under California law, is that:

> "the jury must not be misled into thinking . . . that their discretion in the selection of penalty, as between either of the two alternatives, is in any way circumscribed or limited by law. Their discretion within that area is absolute and they should be so informed." [84]

This conception that the sentencing jury's power to decide between life and death is "absolute" [85] and must be exercised "without benefit of guideposts, standards or applicable criteria" [86] is fundamental to the State's capital punishment legislation.[87] It is plainly, as the California Supreme Court has called it, a "legal vacuum." [88]

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[83] See note 81 *supra*.

[84] *People* v. *Friend*, 47 Cal.2d 749, 306 P.2d 463, 473 (1957).

[85] E.g., *People* v. *Harrison*, 59 Cal.2d 622, 381 P.2d 665, 672, 30 Cal. Rptr. 841 (1963); *People* v. *Mitchell*, 63 Cal.2d 805, 409 P.2d 211, 222, 48 Cal. Rptr. 371 (1966); *People* v. *Brawley*, 1 Cal.3d 277, 461 P.2d 361, 374, 82 Cal. Rptr. 161 (1969). See also *People* v. *Jones*, 52 Cal.2d 636, 343 P.2d 577, 587 (1959) ("The fact that there are ["a great many heinous murders where life imprisonment was imposed instead of the extreme penalty"] . . . only emphasizes how complete the discretion of the jury or trial court is in imposing the appropriate penalty.").

[86] E.g., *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 392, 37 Cal. Rptr. 605 (1964); *People* v. *Hillery*, 65 Cal.2d 795, 423 P.2d 208, 215, 56 Cal. Rptr. 280 (1967); *People* v. *Nye*, —— Cal.3d ——, 455 P.2d 395, 402, 78 Cal. Rptr. 467 (1969); *People* v. *Washington*, —— Cal.2d ——, 458 P.2d 479, 500, 80 Cal. Rptr. 567 (1969). See also *People* v. *Morse*, 60 Cal.2d 631, 388 P.2d 33, 40, 36 Cal. Rptr. 201 (1964) (". . . the jury has no guidelines, no standards, no criteria . . .").

[87] "Ever since People v. Leary (1895), . . . 105 Cal. 486, 496, 39 P. 24, it has been recognized law of this state that by section 190 of the Penal Code, as amended, the Legislature has 'confided the power to affix the punishment within these two alternatives [death or life imprisonment] to the absolute discretion of the

After a California jury has returned a death verdict, the trial judge is legally empowered to set it aside and enter a sentence of life imprisonment instead—not as a matter of

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jury'. . . ." *People* v. *Friend*, 47 Cal.2d 749, 306 P.2d 463, 472 (1957). See *People* v. *Brice*, 49 Cal.2d 434, 317 P.2d 961, 962 (1957) ("selection of punishment is in every instance completely within the absolute discretion of the jury"); *People* v. *Green*, 47 Cal.2d 209, 302 P.2d 307, 313 (1956) (the "discretion of the jury [is not] . . . conditional on, or . . . guided by, any particular circumstances"); *People* v. *Cartier*, 54 Cal.2d 300, 353 P.2d 53, 61, 5 Cal. Rptr. 573 (1960) ("discretion [is] . . . absolute"; there is "no restriction that the law places upon the trier"); *People* v. *Polk*, 63 Cal.2d 443, 406 P.2d 641, 646, 47 Cal. Rptr. 1 (1965) ("The Legislature has entrusted to the absolute discretion of the jury the awesome decision between life imprisonment and the death penalty."). See also, e.g., *People* v. *Jones*, 52 Cal.2d 636, 343 P.2d 577, 585 (1959); *People* v. *Mason*, 54 Cal.2d 164, 351 P.2d 1025, 1028, 4 Cal. Rptr. 841 (1960); *People* v. *Purvis*, 56 Cal.2d 93, 362 P.2d 713, 715, 13 Cal. Rptr. 801 (1961); *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 432-433, 16 Cal. Rptr. 370 (1961); *People* v. *Love*, 56 Cal.2d 720, 366 P.2d 33, 38, 809, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481 (1961); *People* v. *Terry*, 57 Cal. 2d 538, 370 P.2d 985, 1004, 21 Cal. Rptr. 185 (1962); *People* v. *Polk*, 63 Cal.2d 443, 451, 406 P.2d 641, 646, 47 Cal. Rptr. 1 (1965); *People* v. *Anderson*, 64 Cal.2d 633, 414 P.2d 366, 372, 51 Cal. Rptr. 238 (1966); *People* v. *Bandhauer*, 66 Cal.2d 524, 426 P.2d 900, 905, 58 Cal. Rptr. 332 (1967); *People* v. *White*, 69 Cal. 2d 751, 446 P.2d 993, 999, 72 Cal. Rptr. 873 (1968); *In re Anderson*, 69 Cal.2d 613, 447 P.2d 117, 123-124, 73 Cal. Rptr. 21 (1968); and see *People* v. *Hamilton*, 60 Cal.2d 105, 383 P.2d 412, 430-431, 32 Cal. Rptr. 4 (1963):

> "There are no basic guide lines to assist the jury in coming to [the penalty] . . . determination. On the trial of the guilt issue the jury is bound by rules of law laid down by the court in its instructions. But on the penalty phase of the trial there are no such guide lines. The jury does not have to find ameliorating circumstances to impose life imprisonment, nor need it find aggravation to impose the death penalty. The choice between the two rests in the absolute discretion of the jury."

[61] *People* v. *Terry*, 61 Cal.2d 137, 390 P.2d 381, 392, 37 Cal. Rptr. 605 (1964); *People* v. *Hines*, 61 Cal.2d 164, 390 P.2d 398, 402, 37 Cal. Rptr. 622 (1964).

"review" in any sense, but in the exercise of a power as absolute and limitless as the jury's own."[89] The California Supreme Court (to which all appeals in death cases go directly) categorically will not review or reduce a death sentence, whether fixed by a jury[90] or by a trial judge in a jury-waived case.[91]

We have been unable to obtain comprehensive information concerning the percentage of persons convicted of non-mandatory capital crimes who are selected to suffer the penalty of death under these California procedures. We do know that, in all cases tried between 1958 and 1966

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[89] *People* v. *Moore*, 53 Cal.2d 451, 348 P.2d 584, 586, 2 Cal. Rptr. 6 (1960). See, e.g., *People* v. *Hill*, 66 Cal.2d 536, 426 P.2d 908, 58 Cal. Rptr. 340 (1957); *People* v. *Love*, 56 Cal.2d 720, 366 P.2d 33, 36-37, 809, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481 (1961); *People* v. *Ketchel*, 59 Cal.2d 503, 381 P.2d 394, 417-418, 30 Cal. Rptr. 538 (1963); *In re Anderson*, 69 Cal.2d 613, 447 P.2d 117, 124, 73 Cal. Rptr. 21 (1968).

[90] E.g., *People* v. *Green*, 47 Cal.2d 209, 302 P.2d 307, 324-325 (1956); *People* v. *Feldkamp*, 51 Cal.2d 237, 331 P.2d 632, 634 (1958); *People* v. *Linden*, 52 Cal.2d 1, 338 P.2d 397, 410 (1959); *People* v. *Rittger*, 54 Cal.2d 720, 355 P.2d 645, 653, 7 Cal. Rptr. 901 (1960); *People* v. *Howk*, 56 Cal.2d 687, 365 P.2d 426, 433-434, 16 Cal. Rptr. 370 (1961); *People* v. *Love*, 56 Cal.2d 720, 366 P.2d 33, 36, 809, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481 (1961); *People* v. *Mitchell*, 63 Cal.2d 805, 409 P.2d 211, 222, 48 Cal. Rptr. 371 (1966); *People* v. *Reeves*, 64 Cal.2d 766, 415 P.2d 35, 42, 51 Cal. Rptr. 691 (1966); *People* v. *Lookado*, 66 Cal.2d 307, 425 P. 2d 208, 221, 57 Cal. Rptr. 608 (1967); *In re Anderson*, 69 Cal.2d 613, 447 P.2d 117, 124, 73 Cal. Rptr. 21 (1968).

[91] E.g., *People* v. *Monk*, 56 Cal.2d 288, 363 P.2d 865, 871, 14 Cal. Rptr. 633 (1961); *People* v. *Lindsey*, 56 Cal.2d 324, 363 P.2d 910, 912, 14 Cal. Rptr. 678 (1961); *People* v. *Welch*, 58 Cal.2d 271, 373 P.2d 427, 430, 23 Cal. Rptr. 363 (1962). Of course, if the evidence is insufficient to sustain *conviction* of a capital offense, the Supreme Court has power to vacate the conviction, and the death sentence falls with it. E.g., *People* v. *Nicholaus*, 65 Cal.2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967). That implies no review of the sentence.

wherein sentencing was done by the same jury that returned a verdict of guilty of first-degree murder, about forty-three percent resulted in a death sentence.[92] Fifty-seven percent resulted in life imprisonment.

3. *Other Jurisdictions*

Other American jurisdictions which retain the death penalty[93] prescribe it for a varying register of offenses[94] but rarely use it except for murder, rape or kidnapping. These active capital crimes are invariably non-mandatory.[95] In order to keep the discussion that follows within manageable bounds, we confine it to the practices used by the

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[92] *Note, A Study of the California Penalty Jury in First-Degree-Murder Cases,* 21 STAN. L. REV. 1297, 1310 n. 27 (1969). There were 103 death sentences in 238 cases.

An earlier study provides the information that, out of a total of 25 cases between 1942 and 1957 in which the California Supreme Court reversed convictions of death-sentenced men, 10 men were reconvicted of the capital offense but only 3 were resentenced to die. *Note, Post-Conviction Remedies in California Death Penalty Cases,* 11 STAN. L. REV. 94, 104 n. 21 (1958).

[93] The most recent description of the legal status of the death penalty in the United States is Reckless, *The Use of the Death Penalty,* 15 CRIME & DELINQUENCY 43 (1969), which cites earlier studies. Since the publication of the Reckless article, New Mexico has abolished the death penalty except for killings of police officers and prison guards and "when the defendant commits a second capital felony after time for due deliberation following commission of a capital felony." N.M. Laws 1969, ch. 128, §1, N.M. Stat. Ann., §40A-29-2.1 (1970 Cum. Supp.).

[94] We collected the capital sentencing provisions of the several States in Appendix B to our brief *amici curiae* in *Boykin* v. *Alabama,* 395 U.S. 238 (1969) (O.T. 1968, No. 642). The most significant change since that compilation is the New Mexico development mentioned in note 93 *supra.*

[95] See our *Maxwell* brief, Appendix A *infra,* p. 26, n. 24.

States[96] in capital sentencing for the crime of murder.[97] Murder accounts for most of the capital sentences handed down in the United States today;[98] and the practices used by most States in sentencing for that crime are the same as those which they use for the other non-mandatory capital crimes.[99]

In almost all States, capital sentencing is done principally by juries. Where the defendant pleads not guilty, some States permit the waiver of jury trial, entailing a trial of guilt and determination of sentence by a judge or by a multi-judge panel; while other States forbid waiver of jury trial. A number of States also forbid a plea of guilty to a capital offense. Most States permit it. Where it is permitted, it usually constitutes a waiver of jury on the

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[96] The United States and the District of Columbia, of course, also authorize capital punishment, in non-mandatory form, for murder. 18 U.S.C. §1111 (1964); D.C. Code §22-2404 (1967). The sentencing discretion conferred by those statutes is described in *Winston* v. *United States*, 172 U.S. 303 (1899), and *Andres* v. *United States*, 333 U.S. 740, 742-744 (1948). It can "be based upon any consideration which [appeals] . . . to the jury." *Id.*, at 743.

[97] We exclude discussion of the statutes found in a few jurisdictions which authorize the death penalty for only a very limited class of murders. N.M. Stat. Ann., §40A-29-2.1 (1970 Cum. Supp.); N.Y. Pen. Law §125.30; Vt. Stat. Ann., tit. 13, §2303 (1969 Cum. pocket part). There are no reported decisions explicating these relatively recent statutes.

[98] Of the 479 men on death row as of December 31, 1968, 405 were under sentence of death for murder. United States Department of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1968* (August, 1969), p. 22.

[99] A number of the statutes that we shall cite in the following notes apply to all non-mandatory capital crimes in the respective jurisdictions. We shall refer to cases interpreting those statutes whether or not they are murder cases. But, by eliminating citation of statutes and cases which apply exclusively to offenses other than murder, we can avoid a great deal of uninformative citation.

question of penalty; but many States impanel a jury (whose waiver some do and others do not permit) even on a guilty plea.[100]

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[100] Alabama: All capital sentencing is done by juries. See *Bankhead* v. *State*, 124 Ala. 14, 26 So. 979, 980-981 (1899); *Burgess* v. *State*, 256 Ala. 5, 53 So.2d 568, 573-574 (1951).

Arizona: A guilty plea entails sentencing by a judge. Ariz. Rev. Stat. §13-453 (1956). It is unclear whether a jury can be waived on a not guilty plea.

Arkansas: All capital sentencing is done by juries. See our *Maxwell* brief, Appendix A *infra*, p. 28.

Colorado: A guilty plea entails sentencing by a judge. Colo. Rev. Stat. Ann. §40-2-3(2)(a), (b), (c) (1965 Perm. cum. supp.). Apparently a jury cannot be waived on a not guilty plea. Cf. *Jones* v. *People*, 155 Colo. 148, 393 P.2d 366 (1964), whose logic suggests this result.

Connecticut: Judges sentence following either a jury-waived guilt trial or a guilty plea. A three judge panel is convened in the latter case but apparently not in the former. Conn. Gen. Stat. Ann., §§53-9, 53-10 (1970-1971 Cum. pocket part).

Florida: Judges sentence following a guilty plea. *Lee* v. *State*, 166 So.2d 131 (Fla. 1964). Juries sentence following a jury trial on a not guilty plea. Fla. Stat. Ann. §919.23(2) (1944). Florida statutes forbid jury waiver on a not guilty plea, Fla. Stat. Ann. §912.01 (1944), but the new Florida Criminal Rules (which may or may not validly supersede the statute in this regard) permit it. Fla. Stat. Ann., Rules Crim. Pro. 1.260 (1967).

Georgia: Judges sentence following either a jury-waived guilt trial or a guilty plea. Ga. Code Ann. §26-3102 (Criminal Code of Georgia, 1968-1969).

Idaho: Apparently all capital sentencing is done by juries. Ida. Code Ann. §18-4004 (1948).

Illinois: Judges sentence following either a jury-waived guilt trial or a guilty plea. Ill. Stat. Ann., tit. 38, §1-7(c)(2) (1970 Cum. pocket part). See note 101 *infra*.

Indiana: Judges sentence following either a jury-waived guilt trial or a guilty plea. Burns Ind. Stat. Ann. §9-1819 (1956 Repl. vol.).

Kansas: Judges sentence following either a jury-waived guilt trial or a guilty plea. Kan. Stat. Ann. §21-4501(a) (1969 Cum. supp.).

Kentucky: Apparently all capital sentencing is done by juries. Ky. Rev. Stat. Ann. §435.010 (1969). See *Rice* v. *Commonwealth*,

In five States, trial judges have responsibility for capital sentencing. But invariably, unless a jury is waived, the question of penalty in these States is first submitted to a jury. The jury's decision in favor of life binds the trial

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278 Ky. 43, 128 S.W.2d 219 (1939) (jury sentencing on guilty plea).

Louisiana: All capital sentencing is done by juries. La. Stat. Ann., Code Crim. Pro., arts. 557, 780, 817 (1967).

Massachusetts: Apparently all capital sentencing is done by juries. Mass. Ann. Laws, ch. 265, §2 (1968).

Mississippi: All capital sentencing is done by juries. Miss. Code Ann., tit. 11, §2217 (Recomp. vol. 1956). See *Yates* v. *State*, 251 Miss. 376, 169 So.2d 792, 802 (1964) (jury sentencing on guilty plea).

Missouri: Sentencing is generally done by juries. Vernon's Mo. Stat. Ann. §§546.410, 559.030 (1953). See *State* v. *Creighton*, 330 Mo. 1176, 52 S.W.2d 556, 563-564 (1932). Practice regarding waivers and guilty pleas is unclear.

Montana: Apparently judges sentence following either a jury-waived guilt trial or a guilty plea. Mont. Rev. Code §94-2505 (Repl. vol. 1969). See *State* v. *Palen*, 120 Mont. 434, 186 P.2d 223 (1947) (judge sentencing on guilty plea).

Nebraska: Apparently judges sentence only following a guilty plea. Neb. Rev. Stat. §28-401 (Reissue vol. 1964). See *State* v. *Alvarez*, 182 Neb. 358, 154 N.W.2d 746 (1967).

Nevada: Apparently all capital sentencing is now done by juries. Nev. Rev. Stat. §200.030(3). Former provisions relating to sentencing by a three-judge court upon a guilty plea were repealed by Nev. Laws 1967, ch. 523 §438, p. 1470.

New Jersey: All capital sentencing is done by juries. A *non vult* plea to a capital offense entails life imprisonment. N.J. Stat. Ann. §§2A:113-3, -4 (1969). See *State* v. *Forcella*, 52 N.J. 263, 245 A.2d 181, 184-190 (1968) (presently pending on petition for certiorari, O.T. 1970, Misc. No. 5011, with regard to the constitutionality of this practice).

New Hampshire: On a guilty plea, a judge may sentence to life imprisonment or may impanel a jury to decide punishment. Otherwise, apparently, all capital sentencing is done by juries. N.H. Rev. Stat. §§585:4, 585:5 (1955).

North Carolina: All capital sentencing is now done by juries. N.C. Gen. Stat. §14-17 (Repl. vol. 1969). See *State* v. *Roseboro*, —— N.C. ——, 171 S.E.2d 886, 893 (1970).

(*footnote continued on next page*)

judge in three States; in two, its decision in favor of death binds him. So, in each of these States, the jury's sentencing power is decisive: the defendant's life depends upon its exercise in at least one direction.[101]

Oklahoma: Judges sentence following a guilty plea. Okla. Stat. Ann., tit. 21, §707 (1958).

Pennsylvania: Judges sentence following a guilty plea. A three-judge court may be convened. Purdon's Pa. Stat. Ann., tit. 18, §4701 (1963); tit. 19, Appendix, Rule Crim. Pro. 1115 (1969 Cum. pocket part).

South Carolina: All capital sentencing is now done by juries. S.C. Code Ann. §16-52 (1962). See *State* v. *Harper*, 251 S.C. 379, 162 S.E.2d 712, 715 (1968).

Tennessee: Apparently all capital sentencing is done by juries. Tenn. Code Ann. §§39-2405, 2406 (1955). See *Gohlston* v. *State*, 143 Tenn. 126, 223 S.W. 839 (1920).

Texas: Apparently all capital sentencing is now done by juries. Vernon's Tex. Stat. Ann., Pen. Code, arts. 1257, 1257(a) (1961); Code Crim. Pro., art. 37.07(2)(b) (1969-1970 Cum. pocket part).

Virginia: Judges sentence following a guilty plea. Va. Code Ann. §§18.1-22, 19.1-250 (Repl. vol. 1960).

Washington: Apparently all capital sentencing is done by juries. Wash. Rev. Code §9.48.030 (1961).

Wyoming: Apparently all capital sentencing is done by juries. Wyo. Stat. Ann. §6-54 (1957). See *State* v. *Brown*, 60 Wyo. 379, 151 P.2d 950, 955 (1944) (jury sentencing on guilty plea).

[101] Delaware: The judge may sentence to life only if the jury recommends life. Del. Stat. Ann., tit. 11, §3901 (1968 Cum. pocket part). Illinois: The judge may sentence to death only if the jury recommends death. Ill. Stat. Ann., tit. 38, §§1-7(c)(1) (1970 Cum. pocket part), 9-1(b) (1964). Maryland: The judge may sentence to death only if the jury does not return a verdict "without capital punishment." Md. Code Ann., art. 27, §413 (Repl. vol. 1967). South Dakota: The judge may sentence to death only if the jury recommends death. S.D. Comp. Laws. §§22-16-12, -13 (1967). However, a jury trial may be waived, leaving sentencing discretion entirely to the judge. S.D. Comp. Laws. §22-16-14 (1967). Utah: The judge may sentence to life only if the jury recommends life. Utah Code Ann. §76-30-4 (1953). See *State* v. *Markham*, 100 Utah 226, 112 P.2d 496 (1941).

The various States express the alternative nature of the penalties of life and death in various ways. Basically there are three forms of statement. The "either-or" form, which simply states the penalties in the disjunctive for the jury's choice, is most common.[102] A considerable number of States provide that the penalty for the crime is death, unless the jury recommends mercy or returns a verdict qualified by words such as "without capital punishment."[103] A few States authorize the death penalty only if the jury's verdict affirmatively calls for it.[104]

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[102] Ala. Code Ann., tit. 14, §318 (Recomp. vol. 1958); Ariz. Rev. Stat. §13-453 (1956); Colo. Rev. Stat. §40-2-3(1), (2)(c) (1965 Perm. cum. supp.); Ida. Code Ann. §18-4004 (1948); Burns Ind. Stat. Ann. §10-3401 (1956 Repl. vol.); Kan. Stat. Ann. §21-4501(a) (1969 Cum. supp.); Ky. Rev. Stat. Ann. §435.010 (1969); Vernon's Mo. Stat. Ann. §559.030 (1953); Mont. Rev. Code, §94-2505 (Repl. vol. 1969); Neb. Rev. Stat. §28-401 (Reissue vol. 1964); Okla. Stat. Ann., tit. 21, §707 (1958); Purdon's Pa. Stat. Ann., tit. 18, §4701 (1963); Tenn. Code Ann. §§39-2405, -2406 (1955); Vernon's Tex. Stat. Ann., Pen. Code, art. 1257 (1961); Va. Code Ann. §§18.1-22, 19.1-250 (Repl. vol. 1960).

[103] Ark. Stat. Ann. §43-2153 (Repl. vol. 1964); Conn. Gen. Stat. Ann. §53-10 (1970-1971 Cum. pocket part); Del. Stat. Ann., tit. 11, §3901 (1968 Cum. pocket part), see note 101 *supra;* Fla. Stat. Ann. §919.23(2) (1944); La. Stat. Ann., Code Crim. Pro., art. 817 (1967); Md. Code Ann., art. 27, §413 (Repl. vol. 1967), see note 100 *supra;* Mass. Ann. Laws, ch. 265, §2 (1968); *Kramer* v. *State,* 60 Nev. 262, 108 P.2d 304, 308-310 (1940); *Ex parte Kramer,* 61 Nev. 174, 122 P.2d 862, 865 (1942), construing Nev. Rev. Stat. §200.030(3); N.J. Stat. Ann. §2A:113-4 (1969); N.C. Gen. Stat. Ann. §14-17 (Repl. vol. 1969); S.C. Code Ann. §16-52 (1962); Utah Code Ann. §76-30-4, see note 101 *supra;* Wyo. Stat. Ann. §6-54 (1957); cf. Miss. Code Ann., tit. 11, §2217 (Recomp. vol. 1956).

[104] Ga. Code Ann. §26-3102 (Criminal Code of Georgia, 1968-1969); Ill. Stat. Ann., tit. 38, §§1-7(c)(1) (1970 Cum. pocket part), 9-1(b) (1964); N.H. Rev. Stat. Ann. §585:4 (1955); S.D. Comp. Laws §22-16-12, -13 (1967); Wash. Rev. Code §9.48.030 (1961).

Ubiquitously, these capital sentencing statutes, whatever their form, are described by the state courts as conferring both unlimited and unguided sentencing power upon the jury. Phrases such as "absolute discretion" and "entirely within the jury's discretion" mark the opinions which construe and apply the statutes.[105] It is invariably said

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[105] *Boggs* v. *State*, 268 Ala. 358, 106 S.2d 263, 266 (1958) ("sole discretion"); see also *Hinton* v. *State*, 280 Ala. 848, 189 So.2d 849, 853 (1966); *Hernandez* v. *State*, 43 Ariz. 424, 32 P.2d 18, 20 (1934) ("wholly within the jury's discretion"); *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804, 805 (1954) ("option lies entirely with the jury"); *State* v. *Donahue*, 141 Conn. 656, 109 A.2d 364, 368 (1954) ("absolute discretion"); *Burnette* v. *State*, 157 So.2d 65, 66 (Fla. 1963) ("entirely within the discretion of a majority" of the jury); *Baugus* v. *State*, 141 So.2d 264, 266 (Fla. 1962) ("determined purely by the dictates of the consciences of the individual jurors"); *Williams* v. *State*, 119 Ga. 425, 46 S.E. 626 (1904) ("a matter solely in their discretion, which is not limited or confined in any case"); see also *Barfield* v. *State*, 179 Ga. 293, 175 S.E. 582, 584 (1934); *McBurnett* v. *State*, 206 Ga. 59, 55 S.E.2d 598, 599 (1949); *People* v. *Bernette*, 30 Ill.2d 359, 197 N.E.2d 436, 443 (1964) ("an optional form of punishment which [the jury] . . . is free to select or reject as it [sees] fit"); *State* v. *Christensen*, 166 Kan. 152, 199 P.2d 475, 479 (1948) ("the jury's exclusive duty"); *Edwards* v. *Commonwealth*, 298 Ky. 366, 182 S.W.2d 948, 951 (1944) ("exclusively within the province of the jury"); *State* v. *Henry*, 197 La. 199, 3 So.2d 104, 108 (1941) ("absolute, unconditional right and power"); see also *State* v. *Jackson*, 227 La. 642, 80 So.2d 105, 108 (1955); *Spain* v. *State*, 59 Miss. 19, 24 (1881) ("right . . . is without any condition) *Duisen* v. *State*, —— Mo. ——, 441 S.W.2d 688, 692 (1969) ("absolute discretion"); *State* v. *Palen*, 120 Mont. 434, 186 P.2d 223, 224 (1947) (bench trial: "entirely within the court's discretion"); *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343, 351 (1959) ("absolute discretion of the jury upon its consideration of all the evidence"); *State* v. *Simmons*, 234 N.C. 290, 66 S.E.2d 897, 898 (1951) ("an unbridled discretionary right"); *Commonwealth* v. *Wooding*, 355 Pa. 555, 50 A.2d 328, 329-330 (1947) ("absolute discretion of the jury"); see also *Commonwealth* v. *Hough*, 358 Pa. 247, 56 A.2d 84, 85-86 (1948); *Commonwealth* v. *Taranow*, 359 Pa. 342, 59 A.2d 53, 55 (1948); *State* v. *Jones*, 201 S.C. 403, 23 S.E.2d 387, 392 (1942) (jury's "discretion in the matter is an unlimited one"); see also *State* v. *Chasteen*, 228 S.C. 88, 88 S.E.2d 880, 887 (1955);

that they provide no standards, rules or guidelines to inform the jury.[106]

Woodruff v. *State*, 164 Tenn. 530, 51 S.W.2d 843, 848 (1932) (under a statute permitting a life verdict if, in the opinion of the jury, there are mitigating circumstances, "[i]n determining whether, in their opinion, there are mitigating circumstances, the jury are left entirely to their discretion. They are not told by the Judge what would be mitigating circumstances. . . ."); *Lovelady* v. *State*, 150 Tex. Crim. App. 50, 198 S.W.2d 570, 573-574 (1947) ("exclusively within the province of the jury"); see also *Franks* v. *State*, 139 Tex. Crim. App. 42, 138 S.W.2d 109, 115 (1940); *State* v. *Markham*, 100 Utah 226, 112 P.2d 496, 497 (1941) ("entirely within its discretion"); see also *State* v. *Vasquez*, 101 Utah 444, 121 P.2d 903, 907 (1942); *State* v. *Brown*, 60 Wyo. 379, 151 P.2d 950, 955 (1944) ("discretion of the jury to impose the penalty of death or life imprisonment is untrammeled").

[106] *Sullivan* v. *State*, 47 Ariz. 224, 55 P.2d 312, 318 (1936) ("The statute does not prescribe what jurors shall or shall not consider"); *State* v. *Walters*, 145 Conn. 60, 138 A.2d 786, 793 (1958) (the penalty decision is "not determined on any standards subject to judicial review"); *Wilson* v. *State*, 225 So.2d 321, 324 (Fla. 1969) ("each juror is free to vote for mercy for any reason at all"); *Manor* v. *State*, 223 Ga. 594, 157 S.E.2d 431, 437 (1967) ("statutes . . . fix no standards for recommending mercy"); *Duisen* v. *State*, —— Mo. ——, 441 S.W.2d 688, 692 (1969), note 104 *supra* ("without standards or rules"); *Sundahl* v. *State*, 154 Neb. 550, 48 N.W.2d 689, 692 (1951) (statute "does not prescribe or authorize the court to prescribe any rule defining or circumscribing the exercise of the right to determine whether the penalty shall be death or imprisonment for life"); see also *Grandsinger* v. *State*, 161 Neb. 419, 73 N.W.2d 632, 637 para. 12, 648 (1955); *State* v. *Roseboro*, —— N.C. ——, 171 S.E.2d 886, 892-893 (1970) ("The very lack of any standard or rule leaves the jury without restriction, free to save the life of the accused as an unfettered act of grace"); *Commonwealth* v. *Wooding*, 355 Pa. 555, 50 A.2d 328, 329-330 (1947), note 105 *supra* ("The statute . . . provides no fixed arbitrary standards regulating the exercise of that discretion. . . . It does not indicate the kind or nature of the factors which should be taken into consideration. Indeed, the question being one purely of penology, there is room for a wide diversity of opinion even as to the object to be accomplished through one sentence of the other, —whether it be to punish the offender, to give opportunity for his reformation, to protect the public against his commission of further crimes, to act as a deterrent to others, or for some or

To be sure, some States, like Ohio, announce that the jury is supposed to make its sentencing decision on the basis of the evidence.[107] Other States flatly reject that

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all of these purposes combined. . . ."); *State* v. *St. Clair*, 3 Utah 2d 230, 282 P.2d 323, 326 (1955) ("They are not restricted to any particular rule of law or limitation upon evidence"); *State* v. *White*, 60 Wash.2d 551, 374 P.2d 942, 955 (1962) ("No standards are required by our statute or the constitution"); and see *Baugus* v. *State*, 141 So.2d 264, 266 (Fla. 1962), note 105 *supra* (the penalty aspect of the case is "so nebulous as to be incapable of definition").

[107] In only a half-dozen States is this plainly the rule, in the sense that it could be embodied in a jury charge without risk of error. Conn. Gen. Stat. Ann. §53-10 (1970-1971 Cum. pocket part); see *State* v. *Walters*, 145 Conn. 60, 138 A.2d 786, 792-794 (1958); *State* v. *Jarolowski*, 38 Del. 108, 103 A. 657, 658 (Ct. Oyer & Terminer 1918); *State* v. *Lee*, 36 Del. 11, 171 A. 195, 200 (Ct. Oyer & Terminer 1933); *State* v. *Winsett*, 205 A.2d 510, 522 (Del. Super. Ct. 1964); Mass. Ann. Laws, ch. 265, §2 (1968); see *Commonwealth* v. *McNeil*, 328 Mass. 436, 104 N.E.2d 153, 156-157 (1952); *Commonwealth* v. *Nassar*, 354 Mass. 249, 237 N.E.2d 39, 44 (1968); *Dinsmore* v. *State*, 61 Neb. 418, 85 N.W. 445, 453 (1901); *Sundahl* v. *State*, 154 Neb. 550, 48 N.W.2d 689, 704 (1951); N.J. Stat. Ann. §2A:113-4 (1969); see *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343, 349-350 (1959); *State* v. *Forcella*, 52 N.J. 263, 245 A.2d 181, 194 (1968); Tenn. Code Ann. §39-2406 (1955) (the statutory requirement that the jury base a life verdict upon mitigating circumstances amounts, in effect, to a directing that it make its decision "under the facts and circumstances appearing," *Porter* v. *State*, 177 Tenn. 515, 151 S.W.2d 171, 174 (1941), since the court is not permitted to define "mitigating circumstances," *Woodruff* v. *State*, 164 Tenn. 530, 51 S.W.2d 843, 847-848 (1932)); *Pixley* v. *State*, 406 P.2d 662, 669 (Wyo. 1965). Opinions in two more States set out charges limiting the jury's determination to the evidence, but the decisions do not involve the question of their propriety in this regard. *State* v. *Owen*, 73 Ida. 394, 253 P.2d 203, 207 (1953); *Shimniok* v. *State*, 197 Miss. 179, 19 So. 760, 766 (1944) (charge that a juror should not vote a death verdict unless he is convinced from the evidence, beyond a reasonable doubt, that the death penalty should be imposed). In several more States, there are opinions containing *dicta* to the effect that the jury's determination should be made on the evidence, usually uttered in connection with hold-

conception.[108] But even the States which accept it find that it implies no standard or principle by which the jury's

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ings that a prosecutor's argument based upon *facts* not in evidence was improper, or that the admission of certain evidence inadmissible on the issue of guilt was prejudicial. These cases might support jury charges in the respective jurisdictions limiting the jury's penalty consideration to the evidence, but probably that would be to read too much into them. *Sukle* v. *People*, 107 Colo. 269, 111 P.2d 233, 235 (1941); *People* v. *Black*, 367 Ill. 209, 10 N.E. 2d 801, 804 (1937); *State* v. *Tiedt*, 360 Mo. 594, 229 S.W.2d 582, 586 (1950); *Jones* v. *Commonwealth*, 194 Va. 273, 72 S.E.2d 693, 696 (1952). On the other hand, in some of these States, and in some other States, it is highly likely that a jury charge instructing the jurors that they may or shall *consider* the evidence (although their decision need not be based upon it) would be sustained. See *Brown* v. *State*, 109 Ala. 70, 20 So. 103, 107-108 (1896); *Jones* v. *People*, 146 Colo. 40, 360 P.2d 686, 692 (1961); and see *Leopold* v. *People*, 105 Colo. 147, 95 P.2d 811, 814 (1939); *Wheat* v. *State*, 187 Ga. 480, 1 S.E.2d 1, 3 (1939); *People* v. *Sullivan*, 345 Ill. 87, 177 N.E. 733, 736 (1931); *People* v. *Ciucci*, 8 Ill.2d 619, 137 N.E.2d 40, 45 (1956); *Commonwealth* v. *Brown*, 309 Pa. 515, 164 A. 726, 730 (1933). Such a charge would be improper in the several jurisdictions (except perhaps Washington) noted in notes 108, 116 *infra*. See also the condemnation of the charge in *Wyett* v. *State*, 220 Ga. 867, 142 S.E.2d 810 (1965).

Concerning the division of authority on the question whether evidence going only to penalty is *admissible*, see note 149 *infra*.

[108] *Sullivan* v. *State*, 47 Ariz. 224, 55 P.2d 312, 318 (1936) (semble); *Pait* v. *State*, 112 So.2d 380, 385 (Fla. 1959); *Spain* v. *State*, 59 Miss. 19, 24-25 (1881); *State* v. *Worthy*, 239 S.C. 449, 123 S.E.2d 835, 845, 848-849 (1962) (Legge, J., speaking for the court on this point); see *State* v. *King*, 158 S.C. 251, 155 S.E. 409, 425-426 (1930); *State* v. *Blakely*, 158 S.C. 304, 155 S.E. 408 (1930); *State* v. *Jones*, 201 S.C. 403, 23 S.E.2d 387, 391-392 (1942) (the last three cases being modified by *Worthy*, *supra*, but not in the present regard); *State* v. *Thorne*, 39 Utah 208, 117 P. 58, 62-63 (1911), overruled on the question whether such error is prejudicial, *State* v. *Riley*, 41 Utah 225, 126 P. 294, 299 (1912); *State* v. *Romeo*, 42 Utah 46, 128 P. 530, 538-539 (1912) (holding charge erroneous but nonprejudicial); *State* v. *Markham*, 100 Utah 226, 112 P.2d 496, 497 (1941) (dictum); *State* v. *Vasquez*, 101 Utah 444, 121 P.2d 903, 907 (1942); *State* v. *Collins*, 50 Wash. 2d 740, 314 P.2d 660, 663 (1957) (semble); but see *State* v. *Smith*, 74 Wash.2d 744, 446 P.2d 571, 590 (1968).

decision can be guided, informed or measured,[109] controlled or reviewed.[110] Not surprisingly, none of these "evidence" States appears to take the "evidence" principle very seriously: in several of them, a jury charge embodying it is optional with the trial judge.[111]

Apart from that question of the role of evidence in the jury's deliberations, jury-charge practice under the various capital sentencing laws falls into four major categories.[112] A very few States appear to favor instructions in terms of "mitigating circumstances," without defining those circumstances.[113] Another very few States approve an

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[109] See the Connecticut cases of *Donahue*, note 105 *supra*, and *Walters*, note 106 *supra*; the Nebraska cases of *Sundahl* and *Grandsinger*, note 106 *supra*; the New Jersey case of *Mount*, note 105 *supra*; the Tennessee case of *Woodruff*, note 105 *supra*; and the Wyoming case of *Brown*, note 105 *supra*. See also the discussion of the Ohio cases at notes 31-41 *supra*.

[110] There seems to be no relation between the jurisdictions which require the jury's decision to be made on the evidence (note 107 *supra*) and those in which any measure of judicial review of the jury has developed (notes 120-123 *infra*).

[111] Ohio: see notes 39-41 *supra*. Nebraska: see the *Sundahl* and *Grandsinger* cases, note 106 *supra*. Wyoming: see the *Pixley* case, note 107 *supra*. The other "evidence" States appear not to have passed upon the question.

[112] We put aside discussion of the question what the jury may or should be told, in the various jurisdictions, with regard to the parole, pardon and commutation aspects of a life sentence. There is much litigation of this question, none of it informative for present purposes.

[113] In Tennessee, the relevant statute requires that a life verdict be based upon mitigating circumstances, Tenn. Code Ann. §39-2406 (1955), and the jury is instructed in these terms. *Woodruff* v. *State*, 164 Tenn. 530, 51 S.W.2d 843, 848 (1932). Colorado has a statute which provides, in effect, that when a homicide is shown, "the burden of proving circumstances of mitigation" devolves on the defendant. This would appear to us to be nothing more than the ordinary principle of homicide lore, in force in

instruction telling the jury that it should not be influenced by mere sentiment, sympathy or passion, but not saying what *should* influence the jury.[114] A larger number of States submit the question of life or death in terms of "absolute" or "unrestricted" discretion, or tell the jurors that they may decide it either way "for any reason or for no reason," or some such phrase.[115] In other States, the

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many jurisdictions by statute or common law, which has to do with degrees of homicide and with justification (e.g., self-defense, defense of others); but the Colorado Supreme Court takes the unusual view that it also applies to the penalty determination. See *Jones* v. *People*, 146 Colo. 40, 360 P.2d 686, 692 (1961); *Jones* v. *People*, 155 Colo. 148, 393 P.2d 366, 367-368 (1964). Apparently a Colorado jury charge could be framed on this principle, but that is not entirely clear. There is also language in *Edwards* v. *Commonwealth*, 298 Ky. 366, 182 S.W.2d 948, 951 (1944), that might support a charge in terms of mitigating circumstances.

[114] *Dinsmore* v. *State*, 61 Neb. 418, 85 N.W. 445, 453 (1901); see also *Sundahl* v. *State*, 154 Neb. 550, 48 N.W.2d 689, 704 (1951); *Pixley* v. *State*, 406 P.2d 662, 669 (Wyo. 1965). See also the jury charge reflected in the record in *Mathis* v. *New Jersey*, O.T. 1970, Misc. No. 5006, trial transcript pp. 653-654.

[115] *State* v. *Donahue*, 141 Conn. 656, 109 A.2d 364, 368 (1954) ("absolute discretion"); *Wheat* v. *State*, 187 Ga. 480, 1 S.E.2d 1, 3 (1939) (jury's power "not limited or confined"; "no rule of law governing the jury"); *Brown* v. *State*, 190 Ga. 169, 8 S.E.2d 652, 655 (1940) ("without rhyme or reason"); *Davis* v. *State*, 190 Ga. 100, 8 S.E.2d 394, 397 (1940) ("with or without a reason"); *McCoy* v. *State*, 191 Ga. 516, 13 S.E.2d 183, 185 (1941) ("rests solely within the discretion, the wish, or desire of the jury"); *Daniels* v. *State*, 199 Ga. 818, 35 S.E.2d 362, 363 (1945) ("with or without reason, arbitrarily, just as they might see fit"); *State* v. *Clokey*, 83 Ida. 322, 364 P.2d 159, 161 (1961) ("you are entirely free to act according to your own judgment"); *State* v. *McMillan*, 233 N.C. 630, 65 S.E.2d 212, 213 (1951) (wherein the court says: "No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. . . ."); see also *State* v. *Marsh*, 234 N.C. 101, 66 S.E.2d 684, 688 (1951); *State* v. *Sim-*

judge is expected to do no more than to tell the jury that it has a choice, and to hand them alternative verdict forms.[116] This latter approach is widely permitted even in States that do not require it.[117] Cases now pending before

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mons, 234 N.C. 29, 66 S.E.2d 897, 898 (1951); *State* v. *Pugh*, 250 N.C. 278, 108 S.E.2d 649, 650-651 (1959); *State* v. *Crawford*, 260 N.C. 548, 133 S.E.2d 232, 239-241 (1963); *State* v. *Worthy*, 239 S.C. 449, 123 S.E.2d 835, 845-849 (1962) (error to refuse charge that jury can make recommendation "without any reason at all"); see also *State* v. *Daniels*, 231 S.C. 76, 97 S.E.2d 902, 905-906 (1957) ("for any reason in the world or for no reason in the world, except that it wants to do so. . . .").

And see *Pait* v. *State*, 112 So.2d 380, 385 (Fla. 1959); *Hicks* v. *State*, 196 Ga. 671, 27 S.E.2d 307, 309 (1943); *State* v. *Henry*, 197 La. 199, 3 So.2d 104, 108 (1941), for appellate formulations of the any-reason-or-no-reason conception.

[116] *Hernandez* v. *State*, 43 Ariz. 424, 32 P.2d 18, 20-21 (1934); *Bagley* v. *State*, 247 Ark. 113, 444 S.W.2d 567, 569 (1969); *Baugus* v. *State*, 141 So.2d 264, 266 (Fla. 1962); see also *Newton* v. *State*, 21 Fla. 53, 99-101 (1884); *Garner* v. *State*, 28 Fla. 113, 9 So. 835, 847 (1891); *Lovett* v. *State*, 30 Fla. 142, 11 So. 550, 556 (1892); *Burnette* v. *State*, 157 So.2d 65, 70 (Fla. 1963); *State* v. *Van Vlack*, 57 Ida. 316, 65 P.2d 736, 755 (1937); *Spain* v. *State*, 59 Miss. 19 (1881); *State* v. *Skaug*, 63 Nev. 59, 161 P.2d 708, 712 (1945); see also *Ex parte Skaug*, 63 Nev. 101, 164 P.2d 743, 747-748 (Nev. 1945); *State* v. *Thorne*, 39 Utah 208, 117 P. 58, 62-63 (1911), overruled on the question whether such error is prejudicial, *State* v. *Riley*, 41 Utah 225, 126 P. 294, 299 (1912); *State* v. *Thorne*, 41 Utah 414, 126 P. 286, 288 (1912); *State* v. *Romeo*, 42 Utah 46, 128 P. 530, 538-539 (1912) (holding the error nonprejudicial).

[117] *Harris* v. *State*, 183 Ga. 574, 188 S.E. 883, 884 (1936); *Hopkins* v. *State*, 190 Ga. 180, 8 S.E.2d 633, 635-636 (1940); *Rice* v. *Commonwealth*, 278 Ky. 43, 128 S.W.2d 219, 223 (1939); *Sundahl* v. *State*, 154 Neb. 550, 48 N.W.2d 689, 692 para. 11, 699-700 (1951); *Grandsinger* v. *State*, 161 Neb. 419, 73 N.W.2d 632, 637 para. 12, 648 (1955); *Commonwealth* v. *Wooding*, 355 Pa. 555, 50 A.2d 328, 329-330 (1947); *State* v. *White*, 60 Wash.2d 551, 374 P.2d 942, 955 (1962); *White* v. *Rhay*, 64 Wash.2d 15, 390 P.2d 535, 540-541 (1964); *Pixley* v. *State*, 406 P.2d 662, 669 (Wyo. 1965) (dictum), discussing *State* v. *Brown*, 60 Wyo. 379, 151 P.2d 950, 955 (1944).

the Court on petitions for certiorari exemplify some of these basic forms of submissions,[118] should the Court wish to examine them.[119]

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[118] There are, of course, some jurisdictions and isolated cases that do not fit into the basic categories. In Delaware, the jury is told that the authorization for a recommendation of mercy "is intended to apply only to those cases where the jury believes from the evidence, all things considered, that life imprisonment would meet the ends of justice and would be a sufficient punishment." *State* v. *Lee*, 36 Del. 11, 171 A. 195, 200 (Ct. Oyer & Terminer 1933). For other Delaware charges, see *State* v. *Galvano*, 34 Del. 323, 154 A. 461, 467 (Ct. Oyer & Terminer 1930); *State* v. *Winsett*, 205 A.2d 510, 522 (Del. Super. Ct. 1964); compare *State* v. *Carey*, 36 Del. 521, 178 A. 877, 878 (Ct. Oyer & Terminer 1935). An old Alabama case, *Brown* v. *State*, 109 Ala. 70, 20 So. 103, 107-108 (1896), approves a charge, no longer in use in that State today (see the Alabama records indicated in note 119 *infra*) which makes reference to the deterrent and incapacitative ends of punishment. In Mississippi, the jury may be told that it should not vote a death verdict unless it believes beyond a reasonable doubt that the death penalty should be imposed. *Shimniok* v. *State*, 197 Miss. 179, 19 So.2d 760, 766 (1944); see the record in *Yates* v. *Cook*, O.T. 1970, Misc. No. 5012, trial transcript, pp. 40-42. And see *Commonwealth* v. *Ross*, 413 Pa. 35, 195 A.2d 81, 86 (1963), in which the trial judge read the jury the Model Penal Code standards, note 10 *supra* but said that it could disregard them if it wanted to.

[119] The form of instruction telling the jury not to be influenced by considerations of sympathy, etc. is exemplified by *Mathis* v. *New Jersey*, O.T. 1970, Misc. No. 5006, trial transcript, at pp. 653-654. The entire *Mathis* charge, pp. 648-653, appears to go beyond the usual New Jersey instruction (see *State* v. *Reynolds*, 41 N.J. 163, 195 A.2d 449, 460-461 (1963)), and has some of the aspects of the standard Delaware instruction, note 118 *supra*.

The unrestricted-discretion form of submission is exemplified by *Furman* v. *Georgia*, O.T. 1970, Misc. No. 5059, trial transcript, pp. 117-118; *Hill* v. *North Carolina*, O.T. 1970, Misc. No. 5136, trial transcript, pp. 91-92; *Roseboro* v. *North Carolina*, O.T. 1970, Misc. No. 5178, trial transcript, pp. 673, 689-690.

Cases in which the jury is simply told that it has discretion or a choice, and is handed verdict forms, are exemplified by *McCants* v. *Alabama*, O.T. 1970, Misc. No. 5009, trial transcript, p. 386; *Swain* v. *Alabama*, O.T. 1970, Misc. No. 5327, trial transcript, pp. 361-362; *Butler* v. *Alabama*, O.T. 1970, No. 5492, trial tran-

In a number of States, a jury's death verdict may be set aside or reduced by the trial court[120] or by an appellate court.[121-122] But in most States it is final and unreviewable.[123]

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script, p. 487; *Thomas* v. *Florida*, O.T. 1970, Misc. No. 5079, trial transcript, pp. 383-384; *Marks* v. *Louisiana*, O.T. 1970, Misc. No. 5007, trial transcript, pp. 75-76, 79; *Moore* v. *Illinois*, O.T. 1970, Misc. No. 5056, of Record, pp. 21 trial transcript, p. 1001; *Walker* v. *Nevada*, O.T. 1970, Misc. No. 5083, record, p. 270 (Instruction #51); *Smith & Riggins* v. *Washington*, O.T. 1970, Misc. No. 5034, trial transcript, pp. 77, 84-85, 89. Transcript references, in each case, are to the jury charge.

[120] Vernon's Mo. Stat. Ann. §546.430 (1953); see *State* v. *Anderson* (Mo. Sup.), 384 S.W.2d 591, 610 (1964). The Missouri Supreme Court's review of the trial judge, and his of the jury, appear in fact to be negligible. *State* v. *Laster*, 365 Mo. 1076, 293 S.W.2d 300, 304-5 (1956). There is also an intimation in *State* v. *Mouzon*, 231 S.C. 655, 99 S.E.2d 672, 676 (1957), that a trial judge in South Carolina might have power to grant a new trial if he thought a death sentence was improper.

[121] Ariz. Rev. Stat. §13-1717(B) (1956); see *State* v. *McGee*, 91 Ariz. 101, 370 P.2d 261, 268 (1962) (enunciating an abuse-of-discretion test and finding no abuse); *State* v. *Robinson*, 89 Ariz. 224, 360 P.2d 474, 478-479 (1961) (same as to judge-imposed sentence); *State* v. *Ramirez*, 34 Ida. 623, 203 P. 279, 282-284 (1921) (enunciating an abuse-of-discretion test and finding no abuse); *Sundahl* v. *State*, 154 Neb. 550, 48 N.W.2d 689, 693 paras. 20-27, 703-706 (1951) (same); *State* v. *Alvarez*, 182 Neb. 358, 154 N.W.2d 746, 750-752 (1967) (same as to judge-imposed sentence); *Waters* v. *State*, 87 Okla. Crim. App. 236, 197 P.2d 299, 305-308 (1948) (reviewing prior cases); *Williams* v. *State*, 89 Okla. Crim. App. 95, 205 P.2d 524, 541-542 (1949) (same); cf. *Shustrom* v. *State*, 205 Ind. 287, 185 N.E. 438, 440 (1933) (intimating possible review of judge-imposed sentence for abuse of discretion). It is also possible that *State* v. *Laws*, 51 N.J. 594, 242 A.2d 333 (1968), may open the door to appellate review in New Jersey, but that appears unlikely.

[122] The preceding two footnotes do not include reference to the States in which capital sentencing is done by a judge following the recommendation of the jury. See note 101 *supra*. The trial judge's death-sentencing is not reviewable in Maryland, *Merchant* v. *State*, 217 Md. 61, 141 A.2d 487, 492 (1958); *White* v. *State*, 227 Md. 615, 177 A.2d 877, 879-880 (1962), *rev'd on other grounds*, 373 U.S. 59

B. The Power Is Unconstitutional

We have described the capital sentencing practices of the several States not for the purpose of urging the Court to draw constitutional distinctions among them, but rather in order to place the Ohio and California versions of those practices in a context that illuminates their nature. What

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(1963), but is in Illinois, *People* v. *Crews*, 42 Ill.2d 60, 244 N.E.2d 593, 595-596 (1969) (bench trial on jury waiver). In Utah, a trial judge may not sentence to life unless the jury returns a life verdict. His refusal to follow that verdict is said to be reviewable, *State* v. *Markham*, 100 Utah 226, 112 P.2d 496, 497 (1941) (finding no abuse of discretion), but a jury's death verdict is final and unreviewable, *State* v. *Cerar*, 60 Utah 208, 207 P. 597, 602 (1922).

[123] Alabama: *Scott* v. *State*, 247 Ala. 62, 22 So.2d 529, 531 (1945); *Rice* v. *State*, 250 Ala. 638, 35 So.2d 617, 619 (1948); *Wilson* v. *State*, 286 Ala. 86, 105 So.2d 66, 71 (1958). Arkansas: see our *Maxwell* brief, Appendix A *infra*, pp. 30-31. Connecticut: *State* v. *Walters*, 145 Conn. 60, 138 A.2d 786, 793 (1958) (dictum). Florida: *Baker* v. *State*, 137 Fla. 27, 188 So. 634 (1939); *Johnson* v. *State*, 61 So.2d 179 (Fla. 1952); *Baugus* v. *State*, 141 So.2d 264, 266 (Fla. 1962); cf. *Davis* v. *State*, 123 So.2d 703, 707-708 (Fla. 1960) (judge sentence). Kansas: Cf. *State* v. *Kilpatrick*, 201 Kan. 6, 439 P.2d 99, 108-111 (1968) (judge sentence). Kentucky: *Rice* v. *Commonwealth*, 278 Ky. 43, 128 S.W.2d 219, 223 (1939). Mississippi; *Shimniok* v. *State*, 197 Miss. 179, 19 So.2d 760, 768 (1944). Montana: Cf. *State* v. *Palen*, 120 Mont. 434, 186 P.2d 223, 224 (1947). Nevada: *State* v. *Butner*, 67 Nev. 936, 220 P.2d 631, 634 (1950). North Carolina: See *State* v. *Ruth*, 276 N.C. 36, 170 S.E.2d 897, 901 (1969). Pennsylvania: Although the Supreme Court does review judge-imposed death sentences, *Commonwealth* v. *Green*, 396 Pa. 137, 151 A.2d 241 (1959), employing an abuse-of-discretion test, *Commonwealth* v. *Hough*, 358 Pa. 247, 56 A.2d 84, 85-86 (1948), it does not review jury-imposed death sentences. *Commonwealth* v. *Zeitz*, 364 Pa. 294, 72 A.2d 282, 285-286 (1950); *Commonwealth* v. *Edwards*, 380 Pa. 52, 110 A.2d 216, 217 (1955); *Commonwealth* v. *Smith*, 405 Pa. 456, 176 A.2d 619, 620-621 (1962). Tennessee: The trial court has no power to set aside a jury-imposed death sentence. See *Batts* v. *State*, 189 Tenn. 1030, 222 S.W.2d 190, 193 (1946). It appears that the Supreme Court also lacks such power, although it may recommend executive clemency. See *Porter* v. *State*, 177 Tenn. 515, 151 S.W.2d 171, 174 (1941). Texas: *Turner* v. *State*, 144 Tex. Crim. App. 327, 162 S.W.2d 978 (1942); *Akins* v. *State*, 148 Tex. Crim. App. 523, 182 S.W.2d 723 (1944). Washington: *State* v. *White*, 60 Wash.2d 551, 374 P.2d 942, 955 (1962).

is wrong with Ohio's and California's methods for selecting the men whom they will kill is not some adventitious, local feature of their respective procedures for the trial of capital cases. It is the basic conception upon which those procedures—and all others like them—rest: that law is a dispensable commodity when juries are empowered to decide the question of life or death.

It would be a mistake, we think, to approach these *Crampton* and *McGautha* cases as though the issue they present were one of the reasonableness, or even of the fundamental fairness, of two States' resolutions of a problem of criminal trial procedure. Were that the issue, of course "[t]olerance for a spectrum of state procedures dealing with a common problem" might well be appropriate. *Spencer* v. *Texas*, 385 U.S. 554, 566 (1967). If Ohio's or California's legislature, or any other, had given considered attention to the creation of *any* regular and systematic procedure for selecting, among the men convicted of first-degree murder, those who should die from those who should live, then deference might properly be given to that manifestation of "the constitutional power of the States to promulgate their own rules . . . to try their own state-created crimes in their own state courts . . . ." *Id.*, at 569.

But the problem is that neither Ohio nor California nor any other State now maintains "procedures" or "rules"—in the sense in which a regularized system of law understands the concepts of "procedures" and "rules"—for taking away convicted capital felons' lives. What passes for procedure in this most momentous matter that any temporal court can decide is simply institutionalized arbitrariness. Nice questions of judgment as to whether one lawful system or another comports with constitutional norms is

altogether beside the point. The question is whether the Constitution requires that there *be* a lawful system for the choice between the penalties of life and death.

It is obvious, we believe, that conferring absolute, undirected, arbitrary power upon jurors to make that choice *ad hoc* is not a lawful system. Undoubtedly, its pervasive use among the States is entitled to considerable weight in adjudging the question of its constitutionality. But so, also, is their experience in its use.

No state court that has ever construed or applied these "discretionary" capital sentencing statutes has been able to regularize or rationalize them, or to discover any principle by which their operation could be made to conform to the rule of law.[124] Rather, they have universally been treated as relegating the issue of human life to the "absolute, unconditional right and power" [125] of individual jurors, as giving them an "unbridled discretionary right," [126] an "absolute discretion which should not be influenced by the court" [127] and which must be exercised "without benefit of guideposts, standards or applicable criteria," [128] to "extend or withhold [life] as they see fit," [129] "with or without reason, arbitrarily, just as they might see fit." [130] If there is any other field, practice, process or operation of *law*, civil or criminal, petty or enormous, in which judicial deci-

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[124] See text and notes at notes 31-44, 56-91, 105-122 *supra*.

[125] *State* v. *Henry* (Louisiana), note 105 *supra*.

[126] *State* v. *Simmons* (North Carolina), note 105 *supra*.

[127] *Howell* v. *State* (Ohio), text below note 34 *supra*.

[128] See the California decisions cited in note 86 *supra*.

[129] *Liska* v. *State* (Ohio), note 31 *supra*.

[130] *Daniels* v. *State* (Georgia), note 115 *supra*.

sion-making is bounded and defined by terms such as these —and invariably defined only by such terms as these—we are unaware of it.

The terms are important for two reasons. First, they demonstrate that the shockingly arbitrary *consequences* of this fashion of administering the death penalty[131]—the "ghastly, brainless lottery" [132] in which a "small and capricious selection of offenders have been put to death [while most] persons convicted of the same crimes . . . [and many] whose crimes were equally or more atrocious" are permitted to live[133]—are not simply administrative vagaries or abuses. They are the very results contemplated and expressly authorized by the capital sentencing statutes. These consequences, as the California Supreme Court has resignedly said, "only [emphasize] how complete the discretion of the jury or trial court is in imposing the appropriate penalty." [134]

Second, the terms invariably used by the courts in administering these statutes clarify the issue now posed for this Court's decision. The States of Ohio and California will doubtless point out, and quite correctly, that all of the lower courts which have considered the constitutionality of the statutes have sustained them.[135] But what is important, we think, is that those courts have not sustained the stat-

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[131] Those consequences are described in our *Maxwell* brief, Appendix A *infra*, pp. 11-24.

[132] *Id.*, p. 11.

[133] *Id.*, p. 12.

[134] *People* v. *Jones* (California), note 85 *supra*.

[135] See our Supplemental Brief for Petitioner, in *Maxwell* v. *Bishop*, O.T. 1969, No. 13, pp. 31-32 nn. 21, 22.

utes on the theory that they are non-arbitrary; they have sustained them despite the statutes' recognized arbitrariness. When decisions not condemning but applying these statutes can treat them as a "legal vacuum," [136] as creating a decision-making process "so nebulous as to be incapable of definition," [137] the Due Process question could hardly be more baldly put.

We have developed in our *Maxwell* brief the reasons and authorities which lead us to conclude that the Due Process question can have only one answer:—that the arbitrary capital sentencing power which these statutes confer upon juries is unconstitutional because it flouts the basic purpose of Due Process, "to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966).[138] We will not repeat that argument here. However, in view of the differences, in some matters of detail, between the Arkansas statute involved in *Maxwell*, Ohio's, California's, and those of other States, we think it necessary to add three short points. The essence of the points is that these statutory differences are constitutionally immaterial; and that the statutes, one and all, violate the Due Process Clause.

First, we think it makes no conceivable difference, for Due Process purposes, whether a statute poses the alternative penalties of life and death in *either-or* form (as does California's) or in *death-unless-the-jury-recommends-mercy* form (as do Ohio's and Arkansas').[139] In either event, the

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[136] *People* v. *Terry* (California), note 88 *supra*.

[137] *Baugus* v. *State* (Florida), note 106 *supra*.

[138] See our *Maxwell* brief, Appendix A *infra*, pp. 45-46.

[139] See text and notes at notes 102-104 *supra*.

selective process is exactly the same, and the jury's power is identical. "Kill him if you want" and "Kill him, but you may spare him if you want" mean the same thing in any man's language.[140] The differing formulations may have differing state-law consequences—with regard, for example, to the application of the requirement of jury unanimity, or the effect of a "silent verdict"—and, of course, many human lives have been made to turn upon those details. But the federal constitutional issue does not.

What is significant, so far as the constitutional issue is concerned, is that a selective process of literally vital importance is occurring, and is equally authorized by all of these verbal forms. Pursuant to that process, juries in thousands of cases choose, from among thousands of persons convicted of "capital" crimes, the considerably smaller number who must actually die. That number is fewer than one-half in California,[141] probably fewer than one-quarter in Ohio,[142] and probably fewer still in most other States.[143] So what is involved in a "recommendation of mercy," just as in an either-or choice, is not "mercy" at all. It is not the sort of dispensation from the normal course of justice that "mercy" suggests. Rather, it *is* the normal course of justice, the routine and invariable practice, for determining which "capital" offenses shall be capitally punished. As such, it must be constitutionally lawful, whatever it be called.

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[140] See *State* v. *Reynolds*, 41 N.J. 163, 195 A.2d 449, 460-462 (1963).

[141] See text and note at note 92 *supra*.

[142] See text and note at note 45 *supra*.

[143] See Appendix B to our *Maxwell* brief, Appendix A *infra*, pp. 24a-34a.

Second, we think it makes no difference, for Due Process purposes, whether the jury's "absolute discretion" is supposed to be exercised upon the basis of the evidence (as in Ohio) or on a broader basis (as in California and Arkansas).[144] Circumscription of the jury's attention to the evidence, without telling them what to look for in the evidence or how to appraise it, hardly satisfies the requirement of the rule of law. "It is scarcely consonant with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness ... which can be found, or inferred, from a backward looking appraisal of his trial record."[145]

Unguided by legal principles, standards or directives of general applicability, the jury (or any individual juror) can do no more with the evidence than to give it some wholly private significance.

> "As a result the jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in [the trial record]. . . . The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner."[146]

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[144] See text and notes at notes 107-111 *supra.*

[145] *Note, The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67, 81 (1960).

[146] *People* v. *Hines,* 61 Cal.2d 164, 390 P.2d 398, 402, 37 Cal. Rptr. 622 (1964). The court is speaking of the California penalty trial, but its observation is equally applicable here.

Plainly, it is the purpose of the rule of law—of the fundamental Anglo-American concept of the law of the land—to forbid just such a decisional process. If it were constitutional, men could be governed without laws, only trials. The constitutionally allowable rule of evidence in our system is to support the application of laws, not to excuse their absence. Cf. *Bouie* v. *City of Columbia*, 378 U.S. 347, 349-350 (1964). So Ohio's practice of giving its juries "absolute discretion" to sentence men to die "in view of all the facts and circumstances disclosed by the evidence" [147] falls far short of Due Process requirements.

Finally, we attach no constitutional significance to the fact that California (unlike Ohio and Arkansas) permits the trial judge to reduce a jury-imposed death sentence. The jury's decision remains nonetheless decisive, because, if it decides that the defendant should live, he lives. It remains nonetheless lawless because, although the trial judge may undo it, he may not review it. Notwithstanding whatever power California trial judges have, Dennis Councle McGautha will go to his death, if he dies, as the result of an unreviewed and unreviewable exercise of arbitrary power by his sentencing jury.

It would be unworldly to suppose that California trial judges do or will set aside a jury's death verdict except in the rarest instances. But even if this were not so, the judges' own power to decide why and when they will set it aside is cut from the same cloth as the jury's. It is, once again, a matter of "absolute discretion," limitless, undefined, uncompassable. We pretermit the question whether capital sentencing of this sort by a judge, without the inter-

[147] *Howell* v. *State* (Ohio), text below note 34 *supra*.

vention of a jury, would be constitutional.[148] As a supposed *corrective* of the lawlessness of capital jury sentencing, it is obviously inadequate. To be sure, it increases—probably in very small measure—the defendant's chances of living; but it does not do so according to any regular or lawful principles. We do not believe that the constitutionality of sentencing a man to play Russian Roulette depends upon the number of times he is required to pull the trigger.

III.

The Issue of the Single-Verdict Capital Trial.

With regard to the constitutionality of the single-verdict capital trial (an issue presented only in the *Crampton* case), we have little to add to what we said in our *Maxwell* brief, Appendix A *infra*, pp. 66-78. One complication does arise from the Ohio rule, unparalleled in Arkansas, that on a trial upon a plea of not guilty to a capital charge, the defendant is not permitted to introduce background evidence "directed specifically toward a claim for mercy." *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935) (Court's Syllabus, 197 N.E., at 214).[149]

If the *Ashbrook* syllabus meant what it appears to say, then Ohio practice might not present that "undeniable ten-

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[148] See note 15, para. 2 *supra*.

[149] See text at note 32 *supra*. States which employ the single-verdict trial procedure on a plea of not guilty in capital cases are divided on the question whether the defendant may present background evidence going solely to the issue of penalty. *Compare* *State* v. *Owen*, 73 Ida. 394, 253 P.2d 203, 207-209 (1953), and *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343, 353-356 (1959), admitting such evidence, *with* *State* v. *Narten*, 99 Ariz. 116, 407 P.2d 81, 86-87 (1965); *Commonwealth* v. *McNeil*, 328 Mass. 436, 104 N.E.2d 153, 156-157 (1952), excluding it.

sion" [150] between constitutional rights—that is, between the privilege against self-incrimination and the right to be heard on the life-or-death question of penalty—that we urged in *Maxwell* as a ground for invalidating Arkansas' single-verdict trial procedure. For, upon the assumption that Ohio law entirely forbade *any* evidence going to penalty, a capital defendant would be pretty much in the same position whether he exercised his privilege or not. Either way, he would be prevented from presenting to the sentencing jurors evidence other than the circumstances of the crime themselves, bearing on the question whether he "was fit to live." [151] Such a state of the law would doubtless present its own constitutional problems; but they would not be the problem briefed and argued in *Maxwell* and upon which review was granted in this *Crampton* case.

However, the *Ashbrook* syllabus means no such thing. For the court in *Ashbrook* recites, with apparent approval, that the trial judge in that case "did permit a great deal of evidence indicating the character of the surroundings of the [defendant] during his previous life, that he was placed in orphan homes . . .," etc. (197 N.E., at 215). And other Ohio cases make it indisputably clear that the law of that State does not purport to restrict the jury's penalty determination to consideration only of the facts surrounding the criminal offense, but permits consideration also of "the other circumstances surrounding this defendant." [152]

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[150] *Simmons* v. *United States*, 390 U.S. 377, 394 (1968).

[151] *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968).

[152] This quotation is from the jury charge approved in *State* v. *Caldwell*, text at note 37 *supra*, and a number of subsequent cases. See generally text and notes at notes 35-39 *supra;* and see the court's discussion relevant to "evidence of the environment of the defendant in the *Caldwell* case, *supra*, 21 N.E.2d, at 315.

What the *Ashbrook* case appears to hold, simply, is that the trial judge has considerable discretion in limiting the latitude allowed to the defendant in the presentation of background evidence.

But, if this is so, it does not at all reduce the tension between the defendant's self-incrimination privilege and his right to be heard on the issues that Ohio law makes relevant to the jury's crucial sentencing choice. On the contrary, it heightens that tension. For the more the trial court is empowered to restrict other sorts of evidence relative to the defendant's background, the more vital becomes his own testimony to the jury. For this reason, all that we said in *Maxwell* applies with the same or added force in Ohio.

IV.

The Question of Retroactivity.

If, as we have urged, the Court rules in petitioners' favor upon either of the issues presented herein, that ruling should be made fully retroactive to the extent of invalidating the sentences of death imposed upon all condemned men tried under procedures which the Court's decision holds unconstitutional. See *Witherspoon* v. *Illinois*, 391 U.S. 510, 523 n. 22 (1968). We stress that only the *sentences*, not the convictions, of these men would be affected.

A. The "Standards" Issue

The claim of unconstitutionality of standardless and arbitrary capital sentencing power (Part II, *supra*) is, by its very nature, directed only against the sentencing process and its fatal result. Vindication of the claim would not

affect any man's conviction: even the present petitioners would be entitled to nothing more than the vacating of their death sentences. And all other men condemned to die under the same unconstitutional procedures would be entitled to the same relief, whatever the dates of their sentencings.

Two considerations compel this conclusion. First, the absence of constitutionally requisite standards for capital sentencing obviously "undermined 'the very integrity of the . . . process' that decided [each man's] . . . fate." *Witherspoon* v. *Illinois, supra,* 391 U.S., at 523 n. 22. Indeed, one could hardly conceive a constitutional error that would more fundamentally attaint " 'the basis of fair hearing and trial' " [153] of the life-or-death penalty determination than this utter lawlessness with regard to the criteria—if there are criteria—by which the determination is made.

Second, the States have absolutely no legitimate interest in killing these men. Where this Court has denied retroactivity to its constitutional decisions affecting individual rights in the criminal process, it has always been upon the recognition that some considerable interest of law enforcement would be adversely affected if the decisions were retroactively applied. E.g., *Linkletter* v. *Walker,* 381 U.S. 618 (1965); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). But the only legitimate law enforcement concern that could even speculatively be supposed to be served by executing a man instead of imprisoning him for life is concern with general deterrence.[154-155] Because deterrence

[153] *Roberts* v. *Russell,* 392 U.S. 293, 294 (1968).

[154] The legitimate aims of the criminal law are (1) moral reinforcement or reprobation, (2) isolation, reformation, rehabilitation of the offender, and (3) deterrence. "Modern penological thought discounts retribution in the sense of vengeance." ROYAL COMMIS-

looks to the future, no deterrent interest is jeopardized by vacating the death sentences of those men who committed their offenses and were sentenced to death in the past—and who, so far as the non-mandatory capital sentencing laws of all the States are concerned, might as readily have been sentenced to life imprisonment, apparently (under the theory of these laws) without ill effect upon deterrence.

SION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] 17. *Accord: Williams* v. *New York*, 337 U.S. 241, 248 (1949); *Morissette* v. *United States*, 342 U.S. 246, 251 (1952); *People* v. *Love*, 53 Cal.2d 843, 350 P.2d 705, 713 n. 3, 3 Cal. Rptr. 665 (1960); *People* v. *Oliver*, 1 N.Y.2d 152, 151 N.Y.S.2d 367, 134 N.E.2d 197, 201-202 (1956). So also does the Eighth Amendment, which now governs the States, *Robinson* v. *California*, 370 U.S. 660 (1962); for the propriety of vengeance, if recognized, would authorize all cruel and unusual punishments.

Moral reinforcement or reprobation doubtless requires that the most serious crimes be punished most seriously. But, obviously, "Grading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty." BEDAU, THE DEATH PENALTY IN AMERICA (1964), 268. The reprobation concern, therefore, hardly needs or warrants capital punishment. See Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT (1967), 3, 16-17, 19. In any event, retroactive application of a decision holding unconstitutional the procedures for selecting those men who are to be capitally punished, and leaving the States free to restore capital punishment to the statute books under constitutionally satisfactory selective procedures, could have no possible effect upon the interest of reprobation.

"[R]eformation . . . can have no application where the death penalty is exacted." ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra*, at 18. As for isolation, the evidence is clear and overwhelming that, for no class of criminals, is death required to render them socially safe. The lesser alternative of imprisonment is ample. Sellin, *The Death Penalty* (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959), 69-79; KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957), 144-152; BEDAU, *op. cit. supra*, at 395-405; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

This, notably, is the dimension in which our contemporary penology differs radically from the penology of two hundred or

If men are to be deterred by threat of the death penalty from committing crimes in the future, it will be because the States in the future, at the time when those crimes would have been committed, will have enacted statutes imposing the death penalty under constitutional procedures that conform to this Court's decision in the present cases. It will not be because men previously condemned to die under unconstitutional procedures have been executed.

The Court gave recognition to precisely identical considerations in *denying* retroactivity to its own decisions whose objective was deterrence of police illegality in *Linkletter* v. *Walker, supra,* and *Johnson* v. *New Jersey, supra.* The logic of *Linkletter* and *Johnson,* applied to a constitutional decision whose only effect is to invalidate *sentences* of death, compels the obverse conclusion: full retroactivity. See *Witherspoon* v. *Illinois, supra.*

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even one hundred years ago. In earlier times, imprisonment was not a safe, humane or economically feasible alternative to capital punishment. See 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948), 31-33; Bedau, The Courts, The Constitution, and Capital Punishment, 1968 UTAH L. REV. 201, 232 (1968). Today it is. The conclusion was drawn by former Attorney General Ramsey Clark in these words:

> "There was a time when self-preservation necessitated [the] . . . imposition [of the death penalty] . . . . Later inordinate sacrifices by the innocent would have been required to isolate dangerous persons from the public. Our civilization has no such excuse."

Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty,* July 2, 1968, Department of Justice Release, p. 2.

[188] By the text, we do not mean to concede the deterrent efficacy of the death penalty. We simply assume it *arguendo* for present purposes.

B. The Single-Verdict Trial Issue

The claim of unconstitutionality of the single-verdict capital trial procedure, upon the grounds that it creates an impermissible tension between the privilege against self-incrimination and the capital defendant's right to be fairly heard on the life-or-death question of penalty (Part III, *supra*), presents a somewhat more complex retroactivity problem. This is so because four classes of persons are potentially affected by the vindication of such a claim. With regard to three of those classes, the retroactivity question is relatively easy; but, as regards the fourth, it is admittedly vexing.

The first class consists of capital defendants who, at their single-verdict capital trial, exercised their constitutional privilege and were sentenced to death. As to them, full retroactivity is appropriate under the reasoning of the preceding Subpart IV(A), dealing with the standards issue. The harm that they have suffered as a result of the unconstitutionality of the single-verdict trial is the imposition of a sentence of death that was not "fairly and reliably determined";[186] only the death sentence is affected; surely the unreliability constitutes a "serious flaw" [187] calling for retroactivity; and, as we have seen, the States have no legitimate interest in enforcing these unreliably determined death sentences.

The second class consists of persons tried for capital crimes under the single-verdict trial procedure who exercised their privilege but were not sentenced to death. They present no retroactivity problem, since the harmless error

[186] *Jackson* v. *Denno*, 378 U.S. 368, 389 (1964).

[187] *Roberts* v. *Russell*, 392 U.S. 293, 294 (1968).

doctrine amply disposes of their cases.[158] The only harm that they might have suffered was the death penalty that was not in fact imposed upon them.

The third class involves defendants tried for capital crimes who foreswore their privilege, testified, were convicted and were sentenced to life imprisonment. They were doubtless denied a constitutional trial, to the extent that their testimony was compelled by their wish to address the jury on the question of penalty and was incriminating. But retroactivity in such cases seems to be denied by the logic of *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966); and since conviction, not merely sentence, is in question here, there appears to be no reason why *Tehan* should not be followed.

The fourth class—defendants tried under the single-verdict procedure who foreswore their privilege, testified, were convicted, and were sentenced to death—is more troublesome. Their *convictions*, assuredly, should be insulated from retroactive invalidation by *Tehan*, as are those of defendants sentenced to life. But their death sentences are another matter. For the States have no more interest in executing those death sentences, following constitutional invalidation of the procedures under which they were imposed, than in executing any other particular men for crimes past. See Subpart IV(A) *supra*.

Of course, the constitutional harm suffered by these men relates to conviction rather than to penalty as such. But it is equally plain that the penalty rests upon the conviction and is authorized only by it. If the conviction, although constitutionally infirm, is retroactively unassailable under

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[158] *Harrington* v. *California*, 395 U.S. 250 (1969).

Tehan, does it necessarily follow that the penalty of death is similarly insulated from invalidation?

We think not. For, with utmost respect, it would be appalling if human life depended upon the fine fabric of this Court's largely discretionary retroactivity doctrines. Those doctrines, and the often subtle distinctions that mark them, are unquestionably a desirable accommodative mechanism in the Court's evolution of constitutional law. Without them, the Court would be placed in the difficult position of choosing between a stagnant Constitution and a perpetually disruptive one. Proper developments in constitutional law could come only at the cost of upsetting reliance interests entitled to the Court's respect. This consideration has both occasioned the Court's pronouncement of principles of non-retroactivity and tortured their contours. For the non-retroactivity concept is inveterately pragmatic, and hardly lends itself to satisfactory doctrinal articulation.

Nor need it do so, when human life is not in the balance. Pragmatic accommodation, most assuredly, is a necessary and proper concern in any system of temporal law. But pragmatic accommodations resulting in the extinction of life is neither necessary nor proper. It is unnecessary because, as we have said, no reliance interest of the States will be adversely affected if the lives of persons unconstitutionally convicted and sentenced to death are not extinguished. It is improper both because the extreme value of human life ought not be compromised by mere pragmatism, however important in other affairs, and because to admit of the possibility of such a compromise by application of the non-retroactivity doctrine would impose precisely the kind of pressures upon the Court that the non-retroactivity doctrine is designed to avoid. For, in deciding whether or not to make a constitutional decision *generally*

retroactive, the Court should not have to be burdened by the strain of the deathful implications of that determination for an unknown number of capitally sentenced men.[159]

"The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). See, e.g., *Hamilton* v. *Alabama*, 368 U.S. 52 (1961). So we think that the Court may appropriately deny retroactivity whose effect would be to release from conviction and consequent imprisonment persons who have been unconstitutionally convicted, while allowing retroactivity as the grounds for invalidation of death sentences imposed upon those convictions.

We recognize that the Court has not taken this course in the past. See *Johnson* v. *New Jersey, supra; Stovall* v. *Denno*, 388 U.S. 293 (1967). But, so far as we are aware, separate consideration of the questions of retroactivity applicable to conviction and to sentence was not urged upon the Court in those death cases. They are distinguishable from the single-verdict aspect of the present case, of course, in that the constitutionally invalid procedures there in question had no particularized application *only* in death cases. Here, by contrast, death sentences have been imposed upon convictions that are unconstitutional (upon the premise that the single-verdict argument prevails) because defendants were compelled to incriminate themselves precisely by a procedure designed by the States to secure death sentences. That distinction might be drawn, but we do not urge it. Rather, we think that any sentence of death supported by a conviction under procedures later held to be unconstitutional cannot constitutionally be executed.

---

[159] See *Stein* v. *New York*, 346 U.S. 156, 196 (1953).

For these reasons retroactivity should be allowed even in the cases of persons who testified at their single-verdict trial, to the extent—and only to the extent—of setting aside their death sentences. Retroactive application of the constitutional rules announced herein to all other classes of death sentences is, as we have said, quite clear.

CONCLUSION

Both standardless capital jury sentencing and the single-verdict capital trial procedure should be held unconstitutional. Those constitutional rulings should be retroactively applied to the extent of invalidating all death sentences obtained by procedures not in conformity with them.

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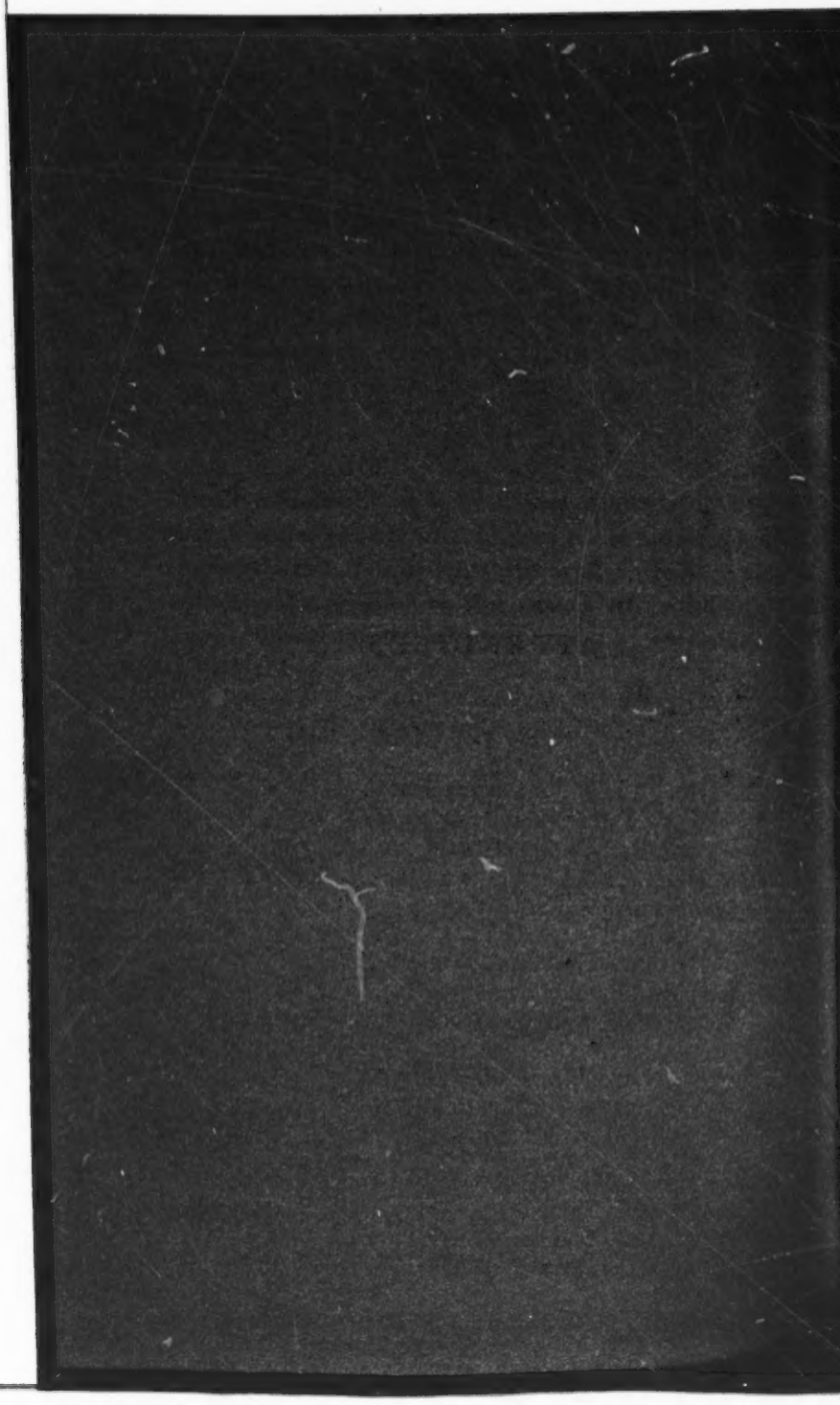
APPENDICES



APPENDIX A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 622

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O.E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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In the

Supreme Court of the United States

October Term, 1968

No. 622

William L. Maxwell, *Petitioner,*

—v.—

O.E. Bishop, Superintendent of Arkansas State Penitentiary, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States District Court for the Eastern District of Arkansas denying petitioner's application for a writ of habeas corpus is reported at 257 F. Supp. 710. It appears in the Appendix [hereafter cited A. ....] at 20-41. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court is reported at 398 F.2d 138, and appears at A. 43-74.

Opinions at earlier stages of this proceeding are reported. The opinion of the Supreme Court of Arkansas affirming petitioner's conviction for the crime of rape and sentence of death is found *sub nom. Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963). Opinions on disposition of an earlier application for federal habeas corpus are

found *sub nom. Maxwell* v. *Stephens*, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965).

Jurisdiction

The jurisdiction of the district court was conferred by 28 U.S.C. §2241(c)(3) (1964). Jurisdiction of the court of appeals was conferred by 28 U.S.C. §§1291, 2253 (1964). The jurisdiction of this Court rests upon 28 U.S.C. §1254 (1) (1964).

The judgment of the court of appeals was entered on July 11, 1968. (A. 75.) The petition for a writ of certiorari was filed in this Court on October 9, 1968, and was granted on December 16, 1968 (A. 76), limited to Questions 2 and 3 of the petition.

Questions Presented

I. Whether Arkansas' practice of allowing capital trial juries absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty upon a defendant convicted of the crime of rape violates the Due Process Clause of the Fourteenth Amendment?

II. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously in a capital case, and thus requires a capital defendant to elect between the exercise of his privilege against self-incrimination and the presentation of evidence requisite to rational sentencing choice, violates the Fifth and Fourteenth Amendments?

Constitutional and Statutory Provisions Involved

The case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

It also involves ARKANSAS STATUTES ANNOTATED, §§41-3403, 43-2153 (1964 Repl. vol.), which provide, respectively, as follows:

> 41-3403. *Penalty for Rape.* — Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment].
>
> 43-2153. *Capital cases — Verdict of life imprisonment.* — The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.

Statement

Petitioner, William L. Maxwell, a Negro, was tried in the Circuit Court of Garland County, Arkansas, in 1962 for the rape of a 35 year old, unmarried white woman. (A. 20.) As we shall describe more fully below, his trial was conducted pursuant to the ordinary Arkansas procedures for trying a capital case upon a plea of not guilty. The issues of guilt and punishment were simultaneously tried and submitted to the jury, which was given no instructions limiting or directing its absolute discretion, in the event of conviction, to elect between the punishments of life or death.[1] (A. 28-30, 40-41; see pp. 27-32, 66 n. 69, 35a *infra*.)

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[1] Technically, an Arkansas jury chooses life by returning the "verdict of life imprisonment" authorized by ARK. STAT. ANN. §43-2153 (1964 Repl. vol.), text, *supra*. It chooses death by returning a guilty verdict without mention of life imprisonment, upon which the death sentence is imposed as a matter of course under ARK. STAT. ANN. §41-3403 (1964 Repl. vol.), text, *supra*. (See A. 29, 44.)

Maxwell's jury elected the punishment of death. The Supreme Court of Arkansas affirmed. *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963).[1] A 1964 federal habeas corpus proceeding challenging his rape conviction and death sentence brought no relief. *Maxwell* v. *Stephens*, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir. 1965) (one judge dissenting), *cert. denied*, 382 U.S. 944 (1965).

The present habeas corpus proceeding was commenced by a second federal petition, filed July 21, 1966. (A. 2-12.) This petition raised, *inter alia*, three related constitutional attacks upon petitioner's death sentence. First, it complained of "the unfettered discretion of the jury to choose between the sentence of life or death. The jury's choice was . . . unregulated by legal principles of general application, was left to be determined by arbitrary and discriminatory considerations, and was in fact arbitrary and discriminatory in petitioner's case." (A. 8.) Second, the petition challenged Arkansas' capital trial practice under which "the issues of guilt or innocence and of life or death sentence [are] . . . determined by a jury simultaneously, after the jury has heard evidence on both issues in the same proceeding." (A. 9.) This single-verdict procedure (as we shall hereafter call it) not merely empowers, but virtually compels, arbitrary capital sentencing because it deprives the sentencing jury of information that is requisite to rational sentencing choice, since "evidence pertinent to the question of penalty could not be presented without prejudicing the jury against the petitioner on the issue of guilt. . . . Nor could petitioner exercise his constitutional right of allocution before the jury which sentenced him, without thereby waiving his privilege against self-incrimination held applicable to the states under the

[1] No review of this decision was sought in this Court.

Fourteenth Amendment. . . ." (A. 9-10.) Finally, petitioner alleged that the arbitrary capital sentencing practices which he attacked had in fact resulted in arbitrary application of the death penalty by Arkansas juries for the crime of rape: Negroes convicted of the rape of white women were discriminatorily sentenced to die on account of race. (A. 5-7.)

The federal district court allowed a thorough evidentiary hearing on the racial discrimination claim. (A. 17-18.) That claim has been excluded from the present phase of the case by this Court's limited grant of certiorari (A. 76); and we need not extend this Statement by describing the evidence presented at the hearing. However, we shall have occasion to refer to it in the argument portions of this brief, under the principle that where a state practice is challenged as conferring arbitrary and lawless power tending to abuse, in a manner forbidden by the Fourteenth Amendment, proof that the power has in fact been regularly abused is entitled to considerable weight.[1] For this reason, we set forth in Appendix A to the brief, pp. 1a-23a *infra*, a detailed description of petitioner's evidence in the district court relating to a thorough and extensive empirical study of capital sentencing by Arkansas juries in rape cases during the period 1945-1965, together with the findings of the district court and of the court of appeals in reference to this study. [Appendices to the brief will hereafter be cited as App., p. ....a, *infra*.]

After hearing, the district court rendered its opinion of August 26, 1966 (A. 20-41), rejecting petitioner's contention of discrimination (A. 33-40) and upholding the Arkansas procedures of unfettered jury discretion in capital

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[1] *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

sentencing (A. 28-33) and the single-verdict capital trial (A. 40-41). The court declined to stay petitioner's execution, set for September 2, 1966 (A. 41) and declined to issue a certificate of probable cause for appeal. Circuit Judge Matthes of the Eighth Circuit similarly refused a stay or a certificate; but petitioner's execution was stayed by Mr. Justice White on September 1, 1966; and this Court subsequently reversed Judge Matthes' orders and remanded to the Court of Appeals for hearing of the appeal. *Maxwell* v. *Bishop*, 385 U.S. 650 (1967).

By its opinion of July 11, 1968 (A. 43-74), the court of appeals rejected on the merits each of petitioner's constitutional claims (A. 47-64 (racial discrimination), 64-68 (unfettered jury discretion), 68-69 (single-verdict procedure)). It accordingly affirmed the judgment of the district court denying petitioner's application for habeas corpus relief. (A. 75.)[4]

Summary of Argument

All informed observers of the institution of capital punishment in this country have noted its salient characteristic: it is unevenly, arbitrarily and discriminatorily applied. That observation is strikingly borne out on this record, which demonstrates that Arkansas juries have per-

[4] Adjudication on the merits was appropriate. State remedies were exhausted, within 28 U.S.C. §2254 (Supp. II, 1966), since no procedures are available in the Arkansas courts by which petitioner can raise his federal constitutional claims. This was alleged in petitioner's habeas application (A. 11), and admitted by respondent's response (A. 14). The district court exercised its discretion under *Sanders* v. *United States*, 373 U.S. 1 (1963), and 28 U.S.C. §2244(b) (Supp. II, 1966), to entertain on the merits each of petitioner's present constitutional contentions, although presented in a second federal habeas corpus petition; and the propriety of its doing so cannot be questioned. See *Maxwell* v. *Bishop*, 385 U.S. 650 (1967).

sistently discriminated on grounds of race in sentencing men to die. The court of appeals below admitted there are "recognizable indicators" that "the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it." (A. 63.) But whether or not racial discrimination was here proved or is provable statistically, it can hardly be denied that the evidence relating to actual exercise of jury discretion in capital cases "casts considerable doubt upon the quality of justice in those particular cases throughout the system."[5] Extreme arbitrariness in the selection of the few men sentenced to death and executed, out of the great number convicted of capital offenses each year, is patent; and (as we have pointed out in greater detail in our *amicus curiae* brief in a companion case)[6] the very extremity of this arbitrariness may effectively conceal the workings of racial discrimination and of every other invidious prejudice forbidden by the Constitution. At the very least, the record compels this Court's strictest scrutiny under the Fourteenth Amendment of the regularity and fairness of the procedures by which state courts, through their juries, choose the men who will die.

I.

Petitioner challenges here the practice of uncontrolled and undirected jury discretion in capital sentencing that lies at the root of arbitrary and discriminatory imposition of the death penalty. This is a practice which, even its defenders must admit, is arbitrary in a legal sense. It confers upon a group of twelve jurors, selected *ad hoc* to

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[5] The phrase is that of petitioner's expert witness, an eminent criminologist, testifying in the district court below. See note 19 *infra*.

[6] *Boykin* v. *Alabama*, O.T. 1968, No. 642. See note 17 *infra*.

decide a particular case, a power to determine the question of life or death that is unlike any other power possessed by a jury, or even by a court, in our legal system. The life-or-death decision is made utterly without standards or governing legal principles; it is made without the limitation of requisite factual findings, or of required attention to any range or realm of fact, or of required consideration of any general rule or policy of law; it is made without any judicial control over the process or the consequence of the jurors' determination. The conscientious and fairminded juror is given not the slightest idea what he is to do, while the covert discriminator is given absolute license to practice his biases in the matter of taking human life. This unfettered jury discretion—or, rather, naked and arbitrary power, lacking every attribute of legal discretion—can be likened only to the unimaginable procedure of submitting to a jury in a civil case the unadorned question whether the defendant ought to be liable to the plaintiff; or, in a criminal case, whether the defendant has done something for which he should be punished. Such submissions are not made anywhere in American law—except in the enormous decision whether men shall live or die. They violate the rule of law that is basic to Due Process, and especially critical in regard to the choice of life or death.

Unfettered jury discretion in capital sentencing exhibits those vices that have repeatedly been condemned by this Court under the constitutional principles forbidding indefiniteness in penal legislation. First, a capital defendant, with his life at stake, does not fairly know how to conduct his defense. He does not know—to take one example—whether the jurors will regard mental disorder as a mitigating circumstance or an aggravating one; or whether five jurors will think the circumstance mitigating while seven vote to kill him for it. As a result, the capital trial

is a grisly game of blind-man's buff, played for the defendant's life. Second, and more important, the conferring on the jury of "a naked and arbitrary power" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 366 (1886)) to take a man's life for any reason or for no reason offends the principle of legality, of regularity—the principle requiring a rule of law and not of men—which the Due Process Clause asserts as a protection against laws that would otherwise be "susceptible of sweeping and improper application" (N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963), "lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws" (*Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942)). Due Process of Law fundamentally repudiates any such power, which "leaves . . . jurors free to decide, without any legally fixed standards" (*Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966)), whether human life shall or shall not be forfeit, even as a punishment for crime.

II.

The vices of unfettered jury discretion are compounded when the jury's life-or-death decision is made under a single-verdict procedure. Whereas unfettered discretion allows the jury arbitrary power, the single-verdict trial virtually requires that that power be exercised arbitrarily. This is so because information that is absolutely requisite to rational sentencing choice cannot be presented to the jury except at the cost of an unfair trial on the issue of guilt or innocence, and of enforced waiver of the defendant's privilege against self-incrimination.

The single-verdict capital trial is federally unconstitutional for two reasons. First, it unnecessarily compels a choice between the defendant's Fifth and Fourteenth

Amendment privilege against self-incrimination (*Malloy* v. *Hogan*, 378 U.S. 1 (1964)) and his Fourteenth Amendment right "to be heard . . . and to offer evidence of his own" (*Specht* v. *Patterson*, 386 U.S. 605, 610 (1967)) on the vital question of capital sentencing. As a result, it unconstitutionally burdens the Privilege (*United States* v. *Jackson*, 390 U.S. 570 (1968); *Simmons* v. *United States*, 390 U.S. 377 (1968)) by attaching to its exercise the independently unconstitutional consequence that the capital sentencing decision is made irrationally (*Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)), because made "upon less than all of the relevant evidence" (*Jackson* v. *Denno*, 378 U.S. 368, 389 n. 16 (1964)). Second, this procedure that forces the capital defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of sentence" [7] presents a "grisly, hard, Hobson's choice" [8] which is fundamentally unfair, in the Due Process sense, where the wages of the gamble are death.

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Logical presentation requires that our arguments relating to unfettered jury discretion and to the single-verdict procedure be stated separately. Either argument alone is, in our view, sufficient to vitiate William L. Maxwell's sentence of death under the Fourteenth Amendment. However, it must be remembered that both of the challenged procedures were employed at Maxwell's trial. Their vices, as we have pointed out, are mutually compounding. Used together, they deprive Maxwell of his life after a trial utterly lacking in the rudimentary fairness and regularity

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[7] American Law Institute, Model Penal Code, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at 64.

[8] *Whitus* v. *Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964). Cf. *Fay* v. *Noia*, 372 U.S. 391, 440 (1963).

that Due Process assuredly demands when a state empowers its jurors "to answer 'yes' or 'no' to the question whether this defendant was fit to live" (*Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968)).

ARGUMENT

Introduction: The Fact and Implications of Arbitrary Capital Sentencing

Knowledgeable observers of the administration of capital punishment in the United States agree that death is meted out among persons convicted of capital crimes in a fashion that is uneven, rationally unsupportable and arbitrary in the extreme.

> "Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn and forgotten. . . . Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die, makes capital punishment a ghastly, brainless lottery." (Dr. Louis J. West, "A Psychiatrist Looks at the Death Penalty," Paper Presented at the 122nd Annual Meeting of the American Psychiatric Association, Atlantic City, New Jersey, May 11, 1966, p. 2.)

Arbitrariness in the selection of men to be put to death takes several forms. First, there is simply the matter of baseless discrimination among individuals: freakish, whimsical, erratic difference in the treatment of similar men guilty of similar offenses. As the Attorney General of the United States put it recently:

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row." (Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.)

Those who should surely know—the respected long-time wardens of Sing-Sing and San Quentin prisons—corroborate the Attorney General. LAWES, TWENTY THOUSAND YEARS IN SING SING (1932) 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962) 254-255.[1]

Second, there is economic and caste discrimination.

> "[T]he death penalty . . . almost always hits the little man, who is not only poor in material possessions but in background, education, and mental capacity as well. Father Daniel McAlister, former Catholic chaplain at San Quentin, points out that 'the death penalty seems to be meant for the poor, uneducated, and legally impotent offender.'" (DUFFY & HIRSHBERG, *op. cit. supra*, 256-257.)

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[1] See also the testimony of Clinton T. Duffy, in United States Senate, Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, Hearings on S. 1760, *To Abolish the Death Penalty* (unprinted report of proceedings, March 20, 1968), vol. 1, pp. 44-44A: "I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta Prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes more so, than most of those men on the row."

Former Ohio Governor Michael DiSalle has made the same point: "I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective." (DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO STATE L. J. 71, 72 (1964).)[10]

Third, there is persuasive evidence of that most corrosive and invidious form of discrimination, racial prejudice, in the selection of the men who will die. The Federal Bureau of Prisons maintains reliable statistics on executions in the United States since 1930. Between that year and 1962, the year in which petitioner Maxwell was sentenced to die, 446 persons were executed for rape in this country.[11] Of these,

[10] See also the testimony of Michael DiSalle, in Hearings, note 9 *supra*, vol. 1, pp. 14-16. The Governor's observations are supported by those of scholars who have undertaken to describe the characteristics of men on death row in other states. E.g., Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957). And see the study of Florida's death row population described in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, at p. 7 n. 8.

[11] The figures below are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32, Executions 1962 (April, 1963), which was put in evidence as petitioner's Exhibit P-6 at the habeas corpus hearing below. Table 1 thereof shows the following numbers and percentages of executions under civil authority in the United States between 1930 and 1962:

	Negro	*White*	*Other*	*Total*
Rape	399 (89.5%)	45 (10.1%)	2 (0.4%)	446 (100%)
Murder	1619 (49.1%)	1640 (49.7%)	39 (1.2%)	3298 (100%)
Other	31 (45.6%)	37 (54.4%)	0 (0.0%)	68 (100%)
Total	2049 (53.7%)	1722 (45.2%)	41 (1.1%)	3812 (100%)

(Continued on p. 14)

399 were Negroes, 45 were whites, and 2 were Indians. All were executed in Southern or border States or in the District of Columbia. The States of Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida,

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(Continued from p. 13)

Table 2 thereof shows the following numbers of executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by race and state:

Jurisdiction	*Negro*	*White*	*Other*	*Total*
Federal	0	2	0	2
Alabama	20	2	0	22
Arkansas	17	1	0	18
Delaware	3	1	0	4
District of Columbia	2	0	0	2
Florida	35	1	0	36
Georgia	58	3	0	61
Kentucky	9	1	0	10
Louisiana	17	0	0	17
Maryland	18	6	0	24
Mississippi	21	0	0	21
Missouri	7	1	0	8
North Carolina	41	4	2	47
Oklahoma	4	0	0	4
South Carolina	37	5	0	42
Tennessee	22	5	0	27
Texas	66	13	0	79
Virginia	21	0	0	21
West Virginia	1	0	0	1
Total	399	45	2	446

The figures have not changed appreciably since 1963. According to the latest National Prisoner Statistics Bulletin, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 42, Executions 1930-1967 (June, 1968), p. 7, table 1, the following are the numbers and percentages of executions under civil authority in the United States between 1930 and 1967:

	Negro	*White*	*Other*	*Total*
Rape	405 (89.0%)	48 (10.6%)	2 (0.4%)	455 (100%)
Murder	1630 (48.9%)	1664 (49.9%)	40 (1.2%)	3334 (100%)
Other	31 (44.3%)	39 (55.7%)	0 (0.0%)	70 (100%)
Total	2066 (53.1%)	1751 (45.4%)	42 (1.1%)	3859 (100%)

(Continued on p. 15)

Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio of better than one to eleven. The nationwide ratio of executions for the crime of murder was considerably less startling—one Negro for each one white—but still startling enough, since Negroes constituted about one-tenth of the Nation's population during these years.

Of course, these suspicious figures might be explained, not by arbitrary and discriminatory administration of the death penalty, but by some rather extravagant hypotheses about the Negro crime rate.[13] Responsible analysts have rejected such an explanation. With virtual unanimity, commissions and individuals studying capital punishment have found

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(Continued from p. 14)
The following is the breakdown of the 435 men reported under sentence of death in the country as of December 31, 1967 (*id.*, pp. 22-23, table 10):

	Negro	*White*	*Other*	*Total*
Nine Northeastern States	33	29	0	62
Twelve North-Central States	24	31	0	55
Thirteen Western States	21	68	2	91
Sixteen Southern States	159	66	0	225
Federal	1	1	0	2
Total	238	195	2	435

[13] In fact, the number of crimes committed by Negroes appears to be three to six times higher than that which the ratio of Negroes in the population would lead one to expect. See BEDAU, THE DEATH PENALTY IN AMERICA (1964) 412. Negroes constitute one-tenth or one-ninth of the population (depending upon the time periods under consideration). So, instead of the expectable one Negro-committed crime to every nine white-committed crimes, there are three to six Negro crimes to every nine white crimes. Far more crimes numerically are obviously committed by whites than by Negroes. Yet one Negro murder convict is executed for every white murder convict executed; and *nine* Negro rape convicts are executed for every white rape convict executed. See text, *supra*.

"evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143. See also UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) 32, 98; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; MATTICK, THE UNEXAMINED DEATH (1966) 5, 17; BEDAU, THE DEATH PENALTY IN AMERICA (1964), 411-413; Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1966); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 26 SOCIAL FORCES 369 (1949); Johnson, *The Negro and Crime*, 271 ANNALS 93 (1941).

In order to provide a more systematic and rigorous examination of the evidence of racial differentials in capital sentencing, an extensive empirical study of sentencing patterns in rape cases was undertaken in 1965 by Dr. Marvin E. Wolfgang, an eminent criminologist, at the request of counsel for petitioner Maxwell (who also represent numerous condemned men in other States). Dr. Wolfgang's study covered every case of conviction for rape in 250 counties in eleven States during the twenty-year period 1945-1965. The data gathered in Arkansas, and Dr. Wolfgang's analysis of that data, were the subject of his testimony at the habeas corpus hearing below. The testimony and the findings of

the lower courts relating to it are described in detail in Appendix A, pp. 1a-23a *infra*. We summarize them briefly here because of the importance of Dr. Wolfgang's conclusions, which confirm the earlier impressions of racial discrimination on the basis of the first fully controlled, exacting scientific study of the subject.

Dr. Wolfgang's study began with the collection of data concerning every case of conviction for the crime of rape on the docket books of nineteen randomly selected Arkansas counties, containing 47% of the State's total population, for the twenty years 1945-1965. The nineteen counties were selected by accepted areal sampling methods with the goal of producing a sample that would be representative of the State of Arkansas as a whole; and, in the opinion of the expert statistician whom Dr. Wolfgang employed to perform the sampling operation, "inferences drawn from this sample . . . are valid for the State of Arkansas." One point should be stressed. The study, from the outset, concerns cases of *conviction* for the capital crime of rape, and what is studied is the performance of Arkansas juries in selecting the convicted defendants upon whom they impose the death penalty. It thus controls completely the possibility, suggested above, that high frequencies observed in the sentencing of Negroes to die for the crime of rape might be explained by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. This study compares the rate of death sentencing for Negro and white defendants *all of whom* have been convicted of rape.

Field researchers dispatched to Arkansas conducted an exhaustive investigation of each case where a rape conviction had been had in the sample counties. They followed a predetermined pattern for exploring the available sources of information about each case, beginning with court records, trial transcripts, witness blotters, file jackets, judicial opinions, etc., then proceeding to prison and pardon board

records, and finally to newspaper files and interviews with trial counsel. They had uniform procedures for assigning priorities to information sources in the event of conflicts; and they used a uniform schedule, with objectively defined categories, for recording the data found. At the hearing below, the State of Arkansas conceded the validity of all of the data thus gathered and recorded.

The "critical" data for each case were race of defendant, race of victim, and sentence. Dr. Wolfgang analyzed these variables and found conclusively that Negro defendants convicted of the rape of white women were disproportionately frequently sentenced to death. Applying tests of statistical significance that are generally used in the social sciences (and in other disciplines, such as medical research, as well), he found that the disproportionate frequency with which the death sentence was imposed on these Negro defendants was so great that there was a less than two per cent probability of its having occurred by chance. Put another way, if race were not really related to the capital sentencing patterns of Arkansas juries, the results observed in the twenty years between 1945 and 1965 could have occurred fortuitously in fewer than two twenty-year periods since the birth of Christ. Not surprisingly, the district court agreed with Dr. Wolfgang in finding that the markedly over-frequent sentencing to death of Negroes convicted of rape of white women "could not be due to the operation of the laws of chance."

Dr. Wolfgang next proceeded to determine whether any other ascertainable circumstance in these rape cases could account for the differential sentencing. The data gathered by the researchers included not merely race and sentence, but 28 pages of information about each case: characteristics of the defendant (age, family status; occupation; prior criminal record; etc.) and of the victim (age; family status;

occupation; husband's occupation if married; reputation for chastity); nature of the defendant-victim relationship (prior acquaintance; prior sexual relations, manner in which defendant and victim arrived at the scene of the offense); circumstances of the offense (number of offenders and victims; place; degree of violence or threat employed; degree of injury received by victim; housebreaking or contemporaneous offenses committed by defendant; presence of members of the victim's family and threats or violence employed against them; nature of intercourse; involvement of alcohol; etc.); and circumstances of the trial (plea; presentation of defenses of insanity or consent; joinder for trial of other charges against the defendant or co-defendants; whether defendant testified; nature of his legal representation (retained or appointed); etc.). Every one of these variables for which sufficient information could be gathered from the official records and other sources studied was analyzed with a view to determining whether it might explain or account for the phenomenon of racially differential sentencing. Dr. Wolfgang concluded that no non-racial variable of which analysis was possible could account for the differential observed. His ultimate conclusion was "that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of race*, during the years 1945-1965 in the State of Arkansas."

The district court disagreed with this ultimate conclusion, but for reasons that the court of appeals appears to have thought unpersuasive and which will hardly survive scrutiny of the record. See Appendix A, pp. 19a-23a *infra*. The court of appeals itself rejected petitioner's *legal* contention of racial discrimination, for doctrinal reasons that are not now relevant; but it obviously thought that Dr. Wolfgang's *factual* finding of discrimination was not rebuttable. It expressly found that "[t]here are recognizable

indicators . . . that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."

We have set forth this evidence of arbitrary and discriminatory capital sentencing at the outset of our argument for three reasons. First, our specific constitutional attacks upon the Arkansas death-sentencing procedures by which petitioner Maxwell was condemned are, in essence: (1) that the unfettered discretion given Arkansas juries to select between the penalties of life and death, without the guidance of standards or control by legal principles of any sort, allows wholly arbitrary deprivation of human life, in violation of Due Process, and (2) that Arkansas' single-verdict practice in capital trials in effect compels the arbitrary exercise of this arbitrary power because it deprives the defendant who exercises his privilege against self-incrimination of the opportunity to present to the sentencing jury information that is the indispensable prerequisite of rational sentencing choice. As this Court's prior decisions in several differing sorts of cases make clear, evidence that abuse has in fact occurred has a considerable bearing on the issue whether a practice challenged on the ground of lawlessness tending to abuse is susceptible to that challenge. See cases cited in note 3 *supra*.

Second, there is obviously the most intimate sort of relationship between laws maintaining the death penalty, procedures which allow its imposition arbitrarily, and racial and caste discrimination in its actual administration. In the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in the companion case of *Boykin* v. *Alabama*, O.T. 1968, No. 642, we have analyzed one aspect of that relationship: the point that the "public can easily bear the rare, random occurrence of a punishment

which, if applied regularly, would make the common gorge rise." (Id., at 55.) "A legislator may not scruple to put a law on the books whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily." (*Id.*, at 39; see generally *id.*, at 35-61.)

This is most obviously the case with regard to the death penalty for rape. Only sixteen American jurisdictions retain capital punishment for that offense. Nevada permits imposition of the penalty exclusively in cases where rape is committed with substantial bodily harm to the victim.[13] The remaining fifteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all Southern or border States.[14] The federal jurisdiction and the District of Columbia also allow the death penalty for rape in the jury's unfettered discretion.[15] We think the

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[13] Nev. Rev. Stat. §200.363 (1967). See also §200.400 (1967) (assault with intent to rape, accompanied with acts of violence resulting in substantial bodily harm).

[14] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code §27-463 (1967 Cum. Supp.); see also §27-12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann. Tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3706 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[15] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

relationship is obvious between this map of the legal incidence of capital punishment for rape and the discriminatory exercise of juries' discretion in the actual imposition of death sentences. It is also worth noting that, outside the United States, rape is punishable by death only in Malawi, Taiwan, and the Union of South Africa.[16]

The mediating links between the allowability on the statute books of the death penalty for a crime and its actual use against the few, arbitrarily selected outcasts yearly chosen to die are provided by the death-sentencing procedures challenged in the present case. It is these procedures by which laws of apparently uniform application are converted in practice into instruments of the most vicious discrimination. Their rare, arbitrary and discriminatory use against the poor and the disfavored insulates the laws, in turn, against fair public scrutiny and reprobation. At the same time that a capricious, *ad hoc* selection of the men to be killed makes sentencing patterns virtually immune against judicial control under the Equal Protection Clause,[17] the indefinite and arbitrary character of the sentencing procedures themselves effectively precludes constitutional control of particular death sentences rendered by individual

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[16] UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968), pp. 40, 86.

[17] We make this point at greater length in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, at 53-55. The opinion of the district court below presents an obvious instance of judicial inability to detect racial discrimination where it is concealed under the additional veil of *ad hoc* arbitrariness. See A. 37-40. "Obviously, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often. By being arbitrary in selecting the victims of discrimination, a State can get away with both arbitrariness and discrimination." *Boykin* Brief, *supra*, at 54.

juries.[18] If the arbitrariness and discrimination infecting the administration of the death penalty are to be regulated, it must therefore be through judicial scrutiny of the procedures that permit and encourage such arbitrariness and discrimination.

This brings us to our third point relating to the significance of the evidence of arbitrary and discriminatory capital sentencing. Herbert Wechsler has observed that: "most dramatically when life is at stake, equality is a most important element of justice." *Symposium on Capital Punishment*, 7 N.Y.L.F. 250, 259 (1961). The Fourteenth Amendment makes it an indispensable element of justice under the Constitution; and the Due Process Clause particularly is designed to assure the regularity of procedures necessary to control against uneven and unfair, arbitrary impositions upon the individual.

What is in issue in this case is the essential fairness, regularity and even-handedness required by Due Process in proceedings by which the state determines to take human life. Where the consequences of the use of those procedures are marked by what the court of appeals below acknowledged were "recognizable indicators . . . that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it" (A. 63)—where an extensive, painstaking and rigorous scientific study of the application of those pro-

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[18] The opinion of the court of appeals below makes the point extraordinarily well. It rests principally on the proposition that the court cannot detect actual racial motivation on the part of the particular jury which condemned petitioner to die. See A. 59-64. Any such work of detection would, of course, be impossible because the entire absence in Arkansas law of standards governing the jury's sentencing decision precludes appraisal of the propriety of the decision, hence the inference of discrimination which might attach to an otherwise inexplicable act of impropriety.

cedures "casts considerable doubt upon the quality of justice in those particular cases throughout the system"[19]—surely the procedures which allow these uses and consequences call for the most critical and searching scrutiny of which courts are capable, to assure consistency with Due Process. Such scrutiny, as we shall now show, finds Arkansas' capital sentencing procedures drastically deficient.

I.

Arkansas' Practice of Allowing Capital Trial Juries Absolute and Arbitrary Power to Elect Between the Penalties of Life or Death for the Crime of Rape Violates the Rule of Law Basic to the Due Process Clause.

Reading the formal provisions of Arkansas statutory law governing punishment for the crime of rape, it is easy to be lulled into a quite misleading frame of mind. The statutes say, in effect, that the penalty for rape is death, except that the jury may instead elect to sentence a defendant convicted of rape to life imprisonment. ARK. STAT. ANN. §§41-3403, 43-2153 (1964 Repl. vol.), p. 3 *supra*. The image conveyed is that death is the ordinary and usual consequence of a rape conviction, while the sentence of life imprisonment is some form of extraordinary dispensation from the true course of the law.

This image is as dangerous as it is wrong. Its danger lies not primarily in the sort of simplistic legal reasoning which has sometimes been supposed to be applicable to it: that a dispensing procedure which grants a gratuitous benefit, rather than imposing a burden, escapes the con-

[19] Dr. Marvin E. Wolfgang, testifying on cross examination below (Tr. 81), quoted by the court of appeals at A. 53. Compare the phraseology of the court of appeals relative to "suspicion . . . with regard to southern interracial rape trials as a group over a long period of time." (A. 61-62.)

trol of constitutional safeguards designed to protect the individual from arbitrary and overreaching state action. We do not suppose that this Court would for a moment countenance any such legal argument.[30] The more insidious danger of the image is a subtle attitude which it engenders, that the process of decision-making by which life or death is selected as the penalty for crime is not really terribly important. The defendant, after all, has been convicted of an offense whose punishment is death—although some few defendants may be exempted from the actual necessity of dying. This attitude fosters a view of the procedures for selecting the men who will live and the men who will die, from among the total number of men convicted of capital offenses, that is both unreal and irresponsible.

We hope that there can be no doubt about the facts. The penalty for rape is not death—in Arkansas or anywhere else. Only one quarter of the total number of Arkansas rape convictions analyzed by Dr. Wolfgang resulted in a death sentence.[31] The twenty-five per cent figure is probably somewhat high even for Arkansas;[32]

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[30] The Fourteenth Amendment's requirements of fairness and equality apply not merely to such "rights" as a state is federally compelled to give its citizens, but also to the processes of dispensing such benefits as the state may choose to give them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Cox* v. *Louisiana*, 379 U.S. 536, 555-558 (1965). The principle has been applied to criminal sentencing, *United States* v. *Behrens*, 375 U.S. 162 (1963), and to capital sentencing in particular, *Brady* v. *Maryland*, 373 U.S. 83 (1963). So, even if the view is indulged that Arkansas' capital sentencing procedures do no more than allow the conferring of the benefit of life to a convicted defendant, those procedures are nonetheless constrained by the Due Process and Equal Protection Clauses, as *Brady* squarely holds.

[31] See Petitioner's Exhibit P-4, Appendix B, table 1. There were fourteen death sentences imposed in a total of fifty-five cases.

[32] The fifty-five cases mentioned in the preceding footnote are all of those analyzed by Dr. Wolfgang. A few cases found on the

and it appears far higher than the percentage of rape convicts who are sentenced to death in other states where the offense is potentially capital.[23] It is also true that the penalty for first-degree murder is not death—in Arkansas or anywhere in the United States.[24] By far the greater number of first-degree murder convicts, like rape convicts, are sentenced to some punishment other than death.[25] The testimony of Attorney General Clark, quoted at p. 12 *supra*, was neither heedless nor uninformed: "Most persons convicted of the same crimes [for which "a small and capricious selection of offenders have been put to death"] have been imprisoned."

What is important here is not the respective percentages of men sentenced to life and to death (we shall recur to their significance shortly), but rather the point that a highly selective process of making individuating judgments is occurring, called forth by a state's statutes which give its juries the option between a death sentence and something less. This process begins at the point of a defen-

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docket books could not be analyzed, because information relating to the critical variables was not discoverable. These were ordinarily non-death cases, since official record-keeping in death cases tends to be more fulsome.

[23] See Appendix B, pp. 24a-34a *infra*.

[24] The death penalty for first-degree murder is no longer mandatory anywhere in the United States. See BEDAU, THE DEATH PENALTY IN AMERICA (1964) 27-30, 45-52.

Indeed, there are very few crimes in the United States today that carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several states; perjury in a capital case, etc.). See *ibid.* And see KALVEN & ZEISEL, THE AMERICAN JURY (1966) 301, 435; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

[25] See Appendix B, pp. 24a-34a *infra*.

dant's conviction for a capital crime; it applies to all defendants so convicted; and it involves the making of differentiations between them, choosing those ones among their total number whose lives are to be taken.

The question is not worth debating whether the Fourteenth Amendment's basic requirements of regularity, fundamental fairness, and even-handedness operate as constraints upon such a process of selection. Obviously, they do. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Brady* v. *Maryland*, 373 U.S. 83 (1963). And see *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). As Judge Sobeloff has written in another connection:

> "Under our constitutional system, the payment which society exacts for transgression of the law does not include relegating the transgressor to arbitrary and capricious action." (*Landman* v. *Peyton*, 370 F.2d 135, 141 (4th Cir. 1966).)

The issue is whether the selection process used by the State of Arkansas—and by most other American states which retain capital punishment, we must add—comports with the relevant Fourteenth Amendment constraints or "relegates the transgressor to arbitrary and capricious action" in the manner of deciding whether he lives or dies.

We therefore pass to an examination of the Arkansas process.

A. *The Power Given Arkansas Juries Is Essentially Lawless.*

1. ARK. STAT. ANN. §41-3403 (1964 Repl. vol.), p. 3 *supra*, fixes the punishment for rape as death. Pursuant to ARK. STAT. ANN. §43-2153 (1964 Repl. vol.), p. 3 *supra:*

> "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment. . . ." [36]

This option conferred upon the jury is the exclusive method of selecting, among convicted capital offenders, the ones who die. A jury trial may not be waived in a capital case in Arkansas. ARK. STAT. ANN. § 43-2108 (1964 Repl. vol.); *Scarber* v. *State*, 226 Ark. 503, 506, 291 S.W.2d 241, 242-243 (1956).

2. The only procedural requisite for valid exercise of the option is that the jury must be told it has a choice between life imprisonment and death.[37] It is apparently sufficient, to meet this requirement, that the court hand the jury alternative life and death verdict forms, identify them, and tell the jury it may use either. *Smith* v. *State*, 230 Ark. 634, 642-643, 324 S.W.2d 341, 346 (1959). The Arkansas Supreme Court has expressly approved submission of the penalty option to the jury under instructions which do nothing more than tell the jury it has a choice. *Hays* v. *State*, 230 Ark. 731, 736, 324 S.W.2d 520, 523-524 (1959) ("' . . . it will be your duty to assess the punishment. The punishment for murder in the first degree is

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[36] The predecessor of this section, first giving juries capital sentencing discretion in Arkansas, was enacted in 1915. Arkansas Acts 1915, No. 187, §1, at p. 774.

[37] *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954); *Smith* v. *State*, 205 Ark. 1075, 172 S.W.2d 248 (1943); *Crowe* v. *State*, 178 Ark. 1121, 13 S.W.2d 606 (1929); *Webb* v. *State*, 154 Ark. 67, 242 S.W. 380 (1922). In murder cases, it is also required that the jury be told to determine the degree of the offense; and an explicit first degree verdict is necessary to support a death sentence. *Walton* v. *State*, 232 Ark. 86, 334 S.W.2d 657 (1960); *Jones* v. *State*, 204 Ark. 61, 161 S.W.2d 173 (1942); *Ray* v. *State*, 194 Ark. 1155, 109 S.W.2d 954 (1937); *Wells* v. *State*, 193 Ark. 1092, 104 S.W.2d 451 (1937); but see *Burns* v. *State*, 155 Ark. 1, 243 S.W. 963 (1922).

death by electrocution or, at the option of the jury, imprisonment in the penitentiary for the term of his natural life.'"); *Hodges* v. *State*, 210 Ark. 672, 674, 197 S.W.2d 52, 53 (1946) ("'Gentlemen of the jury, if you wish to return a verdict of guilty and fix the punishment at death, your verdict will be [reciting verdict form]. . . . If you wish to return a verdict and fix the punishment at life imprisonment, you will return the following verdict [reciting verdict form]. . . .'").[11] No Arkansas cases have been found in which more elaborate instructions were given.

3. Arkansas Supreme Court decisions describing the nature of the option given to the jury are little more informative. They do no more than to recite the obvious propositions that: "The legislature evidently meant for the jury to exercise its discretion in selecting the punish-

[11] In *Boone* v. *State*, 230 Ark. 821, 825-826, 327 S.W.2d 87, 89-90 (1959), the jury interrupted its deliberations to inquire of the judge which was the maximum penalty in law, life imprisonment or death. The following transpired:

"'By the Court: No, no, sir the law doesn't say. The law simply says that the penalty shall be life imprisonment in the event of a finding of guilty, or the penalty shall be death in the event of a finding of guilty. It leaves it to the jurors to decide which of these penalties shall be inflicted.'

. . .

"'By the Court Reporter: (Reading) Gentlemen of the Jury, you have asked the court to tell you at this state of your deliberations which is considered in law to be the most severe penalty. Whether it is death by electrocution, or whether it is life imprisonment. Our statutes provide that every person convicted of murder in the first degree shall suffer death or life imprisonment. It is for you, the jury, to say which of these two penalties should be inflicted, the severity of either of those punishments is a matter for each of you to decide to your own satisfaction.

"'By the Court: Gentlemen, are there any other questions?

"'By Member of the Jury: You didn't help us much.

"'By the Court: I am sorry, but I have got to go by the law.'"

ment . . ." (*Needham* v. *State*, 215 Ark. 935, 939, 224 S.W.2d 785, 787 (1949); see *Webb* v. *State*, 154 Ark. 67, 72-75, 242 S.W. 380, 383-384 (1922)), and that "this option lies entirely with the jury." *Alford* v. *State*, 223 Ark. 330, 332, 266 S.W.2d 804, 805 (1954)). The only Arkansas case found which discourses more fully on the nature of the option is *Scarber* v. *State*, 226 Ark. 503, 505, 291 S.W.2d 241, 242 (1956), where the Supreme Court said that a jury charge requiring that the jurors not impose the death penalty unless satisfied beyond a reasonable doubt that the defendant should receive it "placed a greater burden on the state than it was required to assume under the law."

4. One point is quite clear however. The jury's judgment is entirely unreviewable.[29] Although the Arkansas Supreme Court has spoken of its power to "reduce a punishment imposed upon the verdict of a jury . . . on account of . . . excessive punishment," *Blake* v. *State*, 186 Ark. 77, 80-82, 52 S.W.2d 644, 646 (1932), it has repeatedly made clear that this power may be exercised to reduce a death sentence only where (as in *Blake*) the evidence is insufficient to sustain a jury verdict of *conviction* of the capital charge. E.g., *Smith* v. *State*, 230 Ark. 634, 643-644, 324 S.W.2d 341, 346 (1959).[30] Otherwise, with regard to the death penalty, "as we have many times stated, the matter of assessing punishment is strictly within the province of the jury, and we have no power

[29] "The statute gives the jury, and not the court, the right to reduce the punishment. . . ." *Burns* v. *State*, 155 Ark. 1, 8, 243 S.W. 963, 967 (1922) (dictum). *Accord: Webb* v. *State*, 154 Ark. 67, 72, 242 S.W. 380, 383 (1922) (dictum).

[30] Where the evidence will not support conviction on the capital charge but will support conviction of a lesser included offense, the Arkansas Supreme Court reduces the penalty to that provided by law for the lesser offense. This is not, of course, review of the sentence but of the conviction.

to change the fixed punishment unless the proof fails to sustain the charge for which the defendant is convicted." *Nail* v. *State*, 231 Ark. 70, 85, 328 S.W.2d 836, 845 (1959). *Accord: Smith* v. *State*, 230 Ark. 634, 324 S.W.2d 341 (1959); *Young* v. *State*, 230 Ark. 737, 324 S.W.2d 524 (1959); *Hildreth* v. *State*, 215 Ark. 808, 223 S.W.2d 757 (1949); *Rorie* v. *State*, 215 Ark. 282, 220 S.W.2d 421 (1949); *Palmer* v. *State*, 213 Ark. 956, 214 S.W.2d 372 (1948); *Allison* v. *State*, 204 Ark. 609, 164 S.W.2d 442 (1942); *Turnage* v. *State*, 182 Ark. 74, 30 S.W.2d 865 (1930).[31] See also *Hays* v. *State*, 230 Ark. 731, 324 S.W.2d 520 (1959); *Hodges* v. *State*, 210 Ark. 672, 197 S.W.2d 52 (1946).[32] This powerlessness of the Arkansas Supreme Court to review a death sentence stands in sharp contrast to its freely exercised power to reduce jury-fixed sentences in non-capital cases.[33]

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[31] The only death case in which the Arkansas Supreme Court has ever assumed to reduce the penalty without upsetting the conviction is *Davis* v. *State*, 155 Ark. 245, 244 S.W. 750 (1922). In *Davis*, the Supreme Court disbelieved the complaining witness in a rape case and responded by granting clemency to the defendant. Its power to do so was later repudiated, and *Davis* expressly overruled, in the *Allison* case, text *supra*, 204 Ark., at 614; 164 S.W.2d, at 445.

[32] It is in the context of this line of decisions that one must read the phrase in *Ezell* v. *State*, 217 Ark. 94, 102, 229 S.W.2d 32, 36 (1950), declining to reduce a death sentence fixed by a jury, "if it be conceded that we have such power." See also *Black* v. *State*, 215 Ark. 618, 625, 222 S.W.2d 816, 820 (1949).

[33] *Carson* v. *State*, 206 Ark. 80, 173 S.W.2d 122 (1943); *Hadley* v. *State*, 205 Ark. 1027, 172 S.W.2d 237 (1943); *Marks* v. *State*, 192 Ark. 881, 95 S.W.2d 634 (1936); *Ball* v. *State*, 192 Ark. 858, 95 S.W.2d 632 (1936); *Hudspeth* v. *State*, 188 Ark. 323, 67 S.W. 2d 191 (1934). Even where the court refuses to reduce a jury-fixed non-capital sentence, it does not talk of lack of power; it finds no "abuse of discretion" by the jury, *Cook* v. *State*, 225 Ark. 1003, 287 S.W.2d 6 (1956); *Wilkerson* v. *State*, 209 Ark. 138, 189 S.W.2d 800 (1945); *Cheney* v. *State*, 205 Ark. 1049, 172 S.W.2d 427 (1943), and concedes that "we may reduce extreme penalties when not supported by the evidence," *Smith* v. *State*, 194 Ark. 1041, 1045, 110 S.W.2d 24, 26 (1937).

5. Describing the Arkansas death-sentencing practice, used at petitioner Maxwell's trial, the district court below wrote:

> "It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death." (257 F. Supp. at 716; A. 30.)[34, 35]

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[34] Although the transcript of petitioner's state trial has not been included in the materials certified to this Court by the Court of Appeals for the Eighth Circuit, it was before the District Court in petitioner's earlier federal habeas corpus proceeding, see 229 F. Supp. 205, and hence by agreement available to the district court in the present proceeding (A. 17). The district court refers to it in the quoted passage, and in stating, for example, that petitioner did not testify at his trial (A. 41). The Court of Appeals sent for the transcript while the appeal was under submission, and its opinion refers explicitly to it (A. 59, n. 5). For the information of the Court, we set forth in Appendix C the manner in which the sentencing option was submitted to petitioner's trial jury.

[35] In a footnote to this passage, the district court adds: "It does not appear that counsel for petitioner requested any instructions on the subject." (257 F. Supp. at 716, n. 6; A. 30, n. 6.) The court of appeals also noted that "the defense in Maxwell's rape trial requested no instructional standards." (398 F.2d, at 149; A. 65.) But neither court found that petitioner had thereby committed the sort of intentional bypassing required to forfeit federal claims under *Fay* v. *Noia*, 372 U.S. 391 (1963); and no such finding could be made. Petitioner's constitutional complaint is that there are no standards fixed by Arkansas law to govern the jury's death-penalty decision, and in the absence of such standards,

We note the salient characteristics of the death-sentencing process just described.

First, the objective of the process is to differentiate among individuals, in order to select from the total number of men convicted of rape those who will live and those who will die. The purpose for which this differentiation is made is the most arcane, the most intractable judgment known to the criminal law. "It should be understood that much more is involved here than a simple determination of sentence. For the State . . . empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968).

The ends thought to be served by capital punishment—hence, the considerations which bear on the fitness of prescribing it in a particular case—are variable, and hardly a matter controlled by consensus or enlightened by the commonly shared values of our society. Arkansas' legislature has not identified the ends which it thinks worthy of consideration in support of its general decision to retain the death sentence for the offense of rape; nor has it proscribed consideration of whatever other ends may occur to individual men sitting in judgment in rape cases. The sentencer is informed only by his personal intuition and particularistic experience concerning the goals in whose interest he is empowered to kill other men. Sentencing in non-capital cases—however complex the judgments it may require—at least rests upon the common assumption that the offender is to be salvaged if he is salvageable consistently with community protection. Capital sentencing

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counsel could not have conceived what to request the court to charge on the issue. Surely, counsel was not required to make up his own standards, in order to supply the deficiency of Arkansas' legislation.

rejects that assumption, in the case of some men but not others, without explaining who or why.

Second, the consequences to the individual who is sentenced to die are far less recondite than the objectives which may, or may not, underlie the decision to kill him. "Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes." KALVEN & ZEISEL, THE AMERICAN JURY (1966) 448-449. The enormity of the stakes is altogether obvious.[36]

Third, the range of cases and convicted defendants subject to the selection process, and among whom it operates to differentiate, is extraordinarily broad. The crime of rape in Arkansas (as in other states where it is capital) encompasses every variety of consummated sexual assault, whether on a child or a mature woman, whether the victim is brutally injured or physically unharmed, whether the assailant is a prowling stranger or the victim's social companion.[37] The range of capital murder cases is similarly

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[36] We think we need not elaborate the point before this Court, which has so frequently recognized it. *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 n. 20 (1968); *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); *Williams* v. *Georgia,* 349 U.S. 375, 391 (1955); *Stein* v. *New York,* 346 U.S. 156, 196 (1952); *Chambers* v. *Florida,* 309 U.S. 227, 240 (1940); *Powell* v. *Alabama,* 287 U.S. 45 (1932).

[37] The Arkansas statute in effect from 1842 until 1967 defined rape in terms of Blackstone's venerable formulation as "the carnal knowledge of a female, forcibly, and against her will." ARK. STAT. ANN. § 41-3401 (1964 Repl. vol.). But, in this formulation, "forcibly" means nothing more than the degree of force necessary to achieve intercourse, and "against her will" signifies only "without her consent." This is the doctrine generally followed by states which retain the common-law formulation of rape, see PERKINS, CRIMINAL LAW (1957) 110-112, 119-127; and it is the rule announced by the Arkansas cases. *McDonald* v. *State,* 225 Ark. 38, 279 S.W.2d 44 (1955); *Fields* v. *State,* 203 Ark. 1046, 159 S.W.2d 745 (1942); *Davis* v. *State,* 155 Ark. 245, 244 S.W. 750 (1922); *State* v. *Peyton,* 93 Ark. 406, 125 S.W. 416 (1910); *Harvey* v. *State,* 54 Ark. 425, 14 S.W. 645 (1890).

In 1967, Arkansas enacted a new statute dividing rape into degrees but not materially affecting the nature of the charge which

broad.[38] It is quite inconceivable that the legislature which authorized the death penalty in all of these cases thought that it should be used in very many of them. And, indeed, it is used in practice in only a relatively small number.[39] The prescription of the death penalty, with its discretionary incidence, is therefore a striking example of purposive overbreadth—that style of legislation which sweeps far more broadly than its intended target, leaving to *ad hoc* judgment in administration the job of deciding what that target shall be.[40]

Fourth, in the case of the death penalty, the instrument of administration is the lay jury, selected to try a partic-

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constitutes the capital degree. Arkansas Acts 1967, No. 362, p. 830, codified as ARK. STAT. ANN. §41-3401 (1968 Cum. Supp.). First degree rape, which is capital, consists of sexual intercourse with a female "by forcible compulsion," or where the female is "incapable of consent by reason of being physically helpless, or mentally incapacitated," or is less than eleven years old. Second and third degree rape, which are non-capital, involve intercourse, whether or not consensual, with females under the ages of 14 and 16 respectively.

[38] Arkansas has the common form of first degree murder statute, ARK. STAT. ANN. § 41-2205 (1964 Repl. vol.), encompassing murders by poison or lying in wait, felony-murders (arson, rape, robbery, burglary or larceny), and deliberate and premeditated murders. The State follows the widely accepted notion that "premeditation and deliberation to do murder may be formulated in the assailant's mind upon the instant. It does not have to exist in the mind an appreciable length of time." *Nail* v. *State*, 231 Ark. 70, 75, 328 S.W.2d 836, 839 (1959). See *House* v. *State*, 230 Ark. 622, 324 S.W. 112 (1959); *Jenkins* v. *State*, 222 Ark. 511, 261 S.W.2d 784 (1953); *Gilchrist* v. *State*, 100 Ark. 330, 140 S.W. 261 (1911); *Rosemond* v. *State*, 86 Ark. 160, 110 S.W. 229 (1908); *Green* v. *State*, 51 Ark. 189, 10 S.W. 266 (1889). Consequently, as Mr. Justice Cardozo pointed out many years ago, the line between second and first degree murder is paper thin; and virtually all murders are potential first degree cases if the jury takes that view of them. CARDOZO, LAW AND LITERATURE (1931) 97-101.

[39] See Appendix B, pp. 24a-34a *infra*.

[40] This Court has pointed out that such legislation is inherently "susceptible of sweeping and improper application." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

ular case. In pointing out this circumstance, we imply no general criticism of trial by jury. Recognition of the unique virtues of jury trial, see *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), does not preclude the simultaneous recognition that jury trial also has certain peculiar dangers, requiring especial safeguards under the Constitution. See *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Bruton* v. *United States*, 391 U.S. 123 (1968). And it can hardly be doubted that the jury system, for all of its merits, is that form of judicial process which is least capable of developing uniform and consistent rules of decision.[41]

Comparison of the jury with a sentencing judge is instructive in this regard—and none the less because sentencing by judges in this country has itself fallen far short of the marks of regularity and even-handedness.[42] The judge, at least, is a professional sentencer. The very fact that he sentences a considerable number of offenders promotes some consistency in their sentencing, even if it be only the consistency of his habits. In the process, hopefully, he gains some generalizable experience, develops bases for rational comparative judgments; in any event, minimally, he evolves a "feel" for how the cases "line up." As a professional, he is somewhat better guarded against unexamined visceral urges and inflammable emotions than are

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[41] The point has been succinctly stated, with particular reference to jury sentencing, by the cognizant Task Force of the National Crime Commission. "[T]he transitory nature of jury service virtually precludes rational sentencing." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) 26.

[42] See, e.g., Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966); INSTITUTE OF JUDICIAL ADMINISTRATION, DISPARITY IN SENTENCING OF CONVICTED DEFENDANTS (1954).

lay jurors.[43] He shares with other judges and sometimes with corrections personnel a sense of common enterprise and responsibility in regard to sentencing offenders that can be, and often is, a regularizing influence. He talks with other judges; lawyers talk to him about his sentencing practices and theirs; he has contact with corrections people; and he can be affected, as well, by more formal controls and guides:—occasional instances of appellate sentencing review or expressed disapprobation, sentencing conferences and councils, etc. Notwithstanding all of these moderating forces, as we have said, judicial sentencing often is extremely erratic. How much more erratic and uneven then must jurors natively tend to be, who are subject to not a single one of the controls working on the judge? A unique array of twelve untrained individuals assembles; hears one case; sentences one man; then disperses. We repeat that we would not in the least disparage jurors' functioning in this fashion to decide issues—whether factual, judgmental or moral—adequately framed by uniform rules of law. But the prospect that, *without rules*, the jurors will themselves supply uniformity or regularity, is hopeless.

Fifth, in making its selection of the men to die, out of all those convicted, the jury is ordinarily deprived by Arkansas' single-verdict procedure of information that is necessary to any sort of rational selective judgment. We develop this point independently in Part II, pp. 66-78 *infra;* but it must be considered, together with the points made

[43] "The judge very often perceives the stimulus that moves the jury, but does not yield to it. Indeed it is interesting how often the judge describes with sensitivity a factor which he then excludes from his own considerations. Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude." KALVEN & ZEISEL, THE AMERICAN JURY (1966) 497-498.

in paragraphs *First* through *Fourth* above, as composing the background and concrete setting within which Arkansas juries exercise the "option" or "discretion" allowed them in capital sentencing. Having sketched the background, we now come to that "discretion," which is the nub of our constitutional complaint.

Sixth, the power of life-or-death decision given to the jury is absolutely lawless. It is a raw, arbitrary power to kill or to let live, unguided by principle, undirected by concern for specified relevant facts, uncontrolled by any general rules of law, unleashed of any requirement that it be exercised pursuant to valid reasons or even to agreed-upon reasons (since the twelve jurors may vote to kill for twelve disparate reasons), and uncontrollable, unreviewable by any other power in the legal system. It is, simply, the power to take away a convicted man's life for any reason (good or bad, rational or irrational, generally applicable or trotted out for the occasion) or for no reason at all—on a whim, a caprice—or because the defendant did not take the witness stand; because he took the stand, slanderously claimed consent, and was disbelieved; or because of the color of his skin.

Let us examine more closely the nature of this extraordinary "discretion."

(1) Its exercise is not required to rest upon any prerequisite findings of fact. Such findings, of course, are required to support virtually every other judgment of a jury in our legal system. "If you find that the defendant did strike the plaintiff with his car . . ."—thus runs the archetypal jury charge. The requirement of factual findings serves both to guide the conscientious juror and to provide a basis for judicial control by review of the unconscientious one. But a death-sentencing jury need find no facts, either of a specific

sort (for example, that the rape resulted in substantial bodily harm to the victim;[44] or that the defendant has been convicted, or has committed, other rape offenses[45]), or of a more general sort (for example, that the defendant is a likely rape recidivist, or that he is incapable of rehabilitation).

(2) Nor is there any legal prescription, to guide the jury or enable review of its judgment, of any *preclusive* factual findings: circumstances that exclude the death penalty (for example, the defendant's youth; or conduct by the victim which led the defendant on).

(3) Nor is the jury required to consider, or to take account of, any specified facts or concerns.

(4) Nor is there any enumeration, for the jurors, of specified facts or concerns which they *may* consider. The jury's attention is not directed to any range or realm of available factual or judgmental considerations.

(5) Nor is there enumeration and proscription of *im*permissible considerations. The jury is not told that it may not sentence the defendant to death for his unregenerate bad taste in taking the stand and perjuriously claiming consent; or for not taking the stand.

(6) There is no prescription of guiding criteria, legal norms, standards or principles for judgment. In

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[44] The State of Nevada requires such a finding as the precondition of the imposition of a death sentence in a rape prosecution. See note 13 *supra*.

[45] This is the sort of finding required to support the imposition of the harsher penalty allowable under common state legislation dealing with recidivists.

some areas of law, where legal doctrine can do no better, jurors are permitted to employ such general standards as "reasonable care" or "the conduct *of* a reasonable man." These standards are imprecise, but they *are* standards; they serve to tell the jury what the law has determined is the test or benchmark by which the defendant is to be judged. The defendant is liable to the plaintiff if he did not act with the degree of care which a reasonable man would have employed; the jury may decide (within limits) what that degree of care is, but they are told that they must not find against the defendant if he exercised it. No equivalent guidance is provided to the death-sentencing jury. It may—indeed, it must—make up its own governing principles, which may or may not be those that other juries apply to other convicted men. In fact, not even this much rational deliberation is required, for it is illusory to speak about the death-sentencing "jury" and "its" governing principles. The jurors are not directed or required to discuss or to agree upon any common set of principles; and the court's instructions (unlike even such formulations as the "reasonable man") give them nothing to focus any such discussion.

> "The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
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> " . . . Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty. . . . Yet who can say

that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? . . ." (*People* v. *Hines*, 61 Cal.2d 164, 169, 390 P.2d 398, 402, 37 Cal. Rptr. 622, 626 (1964).)

(7) There is no prescription even of the ultimate legal goals and purposes to be considered in the formulation of criteria to guide the death-sentencing decision. Anglo-American law addresses its vaguest sort of directions to courts in such matters as child custody cases, where the "best interests of the child" or some equivalent formulation is the touchstone, or in economic regulation, where "unreasonable" restraints of trade are forbidden. Death-sentencing jurors have not even the direction and delimitation, the concentration of attention upon specified general objectives, which these vague formulations comport. Rather, the power of life-or-death decision is wholly unguided and unconstrained, unlike any other decision made by a lawful tribunal within our legal traditions.[46] It can only be likened to the power that would be conferred by a practice—inconceivable in any American court—of submitting to a jury in a civil case the naked ques-

[46] See KALVIN & ZEISEL, THE AMERICAN JURY (1966) 435:

"The discretion which the [death-sentencing] jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it. For this reason, comparison of judge and jury decision must here depart from the standard pattern of analysis which discussed disagreement in terms of why the jury differed from the judge. We have viewed the latter [in all sorts of other legal judgments] as a kind of baseline representing the law, and we have tried to trace the nuances of jury judgment as it deviated from the legal norm of the judge. For the death penalty, however, the judge is not 'the law' but merely another decider. In no meaningful sense can it be said that the judge's decision is more representative of the law than is the jury's."

[illegible]: "Should the defendant be liable to the plaintiff?" —or, in a criminal matter: "Has the defendant done something for which he should be punished?"

> "We wouldn't turn it over to a jury, the determining of whether the father or the mother or whether the grandmother or a sister-in-law got the child, according to the absolute whim or caprice, or, as you put it, the discretion of the jury. We wouldn't turn over to the whim of a jury the determination of whether a fox terrier belonged to the husband or the wife in a separation. We wouldn't let a jury determine that with absolute discretion. Any issue in the whole legal system that you can think of, rights, property rights, personal rights, are guided by precedents, by standards, and to leave to a jury the absolute discretion to determine whether a person lives or dies, without any guidance, or any compass or standard, principles or anything else, is foreign to the whole basic tradition of the Anglo-Saxon common law. That is the hurdle you have to face and that the Court has to meet in passing on this question."[47]

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[47] We quote this passage because it summarizes better than anything written on the subject, and better than anything we could say, the nature and the vice of standardless discretion in capital sentencing by a jury. The passage is a transcription of a statement by Chief Justice Traynor during a colloquy with the Assistant Attorney General of California in the course of the argument in *In re Anderson*, —— Cal.2d ——, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), a case discussed at pp. 45-56 *infra*. See Transcript of Proceedings in the Supreme Court of California, *In re Anderson*, Crim. No. 11,572, March 28, 1968, pp. 107-108. However, because questions asked from the bench may convey a misleading impression of a judge's views, and because we would not wish to run the slightest risk of misrepresenting those of Chief Justice Traynor —even while using his words exclusively for the purpose of expressing our own thoughts—we feel obliged to set forth here two subsequent, related passages in the colloquy:

"CHIEF JUSTICE TRAYNOR: I wonder if you were making this argument, Mr. Harris. I don't want to put words into

(8) There is no review of the jury's decision, and no judicial safeguard of any sort against invidious discriminations and other abuses. It is therefore not sur-

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your mouth. You look at this problem of standards right in the face and it's awfully easy to talk about ships without rudders or compass, boats without oars and so forth, and about assigning a fox terrier to one person or another without standards, but in this area you just can't find workable standards. Any kind of formula that you put up would simply be magic words, at best. We haven't heard of any precise standards that wouldn't be like mouthing formulas to the jury that it should take into consideration such and such factors and so forth. You can't get anything as precise as a rudder or an oar and so forth. That being the case, the question is whether you are going to have death or not. The State could say that every killing or certain killings, just automatically brought on the death penalty. The present system is a dispensation that the State has made. It is futile to think of standards. I don't know whether you make that argument or not.

. . . . .

"CHIEF JUSTICE TRAYNOR: Let me see if I can restate your argument about discretion, that there are many instances, as you pointed out, where matters are left to the discretion of the trial judge, and that is because the appellate courts, in their wisdom and experience, don't know what precise standards should be set down, because they are not—they haven't had enough experience, haven't had enough cases to lead them, haven't had enough specific items. So when the appellate court doesn't know the answer, it turns the matter over to the discretion of the trial judge, just as in many instances when we don't know the answer to a real tough question, we turn it over to a jury.

"Now, here is the toughest question of all that human beings have to face, as to whether a man should die or not. A man, say, who has thrown gasoline into a tavern and caused, say, seven or eight people to be burned; a man who rapes a girl and savagely cuts her up; who does all of the other heinous things that some of these people have been convicted of.

"Now, the question is this: Should that person die or not? Where are you going to get the guidance that is going to tell you whether a person should die or not?

"Maybe the answer is that because you have no answer, a civilized society wouldn't have the death penalty. But you might retaliate to that, that is really a question for the legislature, but on this question of standards it is impossible to

prising that the performance of jurors in the exercise of the lawless discretion given them is not merely irregular[41] and arbitrary in particular cases,[41] but ex-

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articulate a standard. Of all the questions that could be propounded to mankind, this is one which would defy a Solomon."

(*Id.*, at pp. 113-114, 120-121.) We might add, concerning this last quoted passage, that again in our judgment it goes directly to the heart of the matter. We quite agree that common experience furnishes no easy answers relating to the standards that should govern capital sentencing. All the more reason, we have suggested, why the death-sentencing decision cannot properly be left to the unguided decisions of individual juries. (See pp. 33-34 *supra*.) We deny that it would be impossible for a legislature to provide standards governing capital sentencing, if the legislature gave the matter proper attention and had rational ultimate goals in authorizing capital punishment as the available penalty in any case. (See note 67 *infra*.) However, if the nature of the death penalty, or of a legislature's reasons for ordaining it, is such that no regular, rational, even-handed policies of general applicability can be formulated to govern its administration—with the necessary result that individuals must be condemned to die irregularly, irrationally, unevenly: in short, arbitrarily and without due process of law—then it is our view precisely that the Due Process Clause forbids a civilized society to use this sort of penalty. If a sanction's use *cannot* be made consistent with due process, the Constitution of the United States makes quite clear that the sanction, not due process, must be abandoned.

[41] See KALVEN & ZEISEL, THE AMERICAN JURY (1966) 437-449. Examining jury penalty decisions in 111 death cases, and the presiding judges' evaluations of them, Kalven and Zeisel find that jurors and judges agree on a sentence of imprisonment in 76 cases, agree on death in 14, and disagree in 21. Significantly, therefore, where death is the outcome, there is more often disagreement than agreement. Patterns in jury sentencing emerge, in the sense that death-sentence cases are frequently characterized by the same sorts of aggravating circumstances. But these same factors appear in many cases where the death sentence is not imposed. "Many of the murder cases in which the judge and jury disagree on the death penaly appear no less heinous than those in which they agree." *Id.*, at 439. "The leniency categories have a plausible ring. But the brute fact is that each time one of the factors listed was persuasive to one of the deciders, it was unpersuasive to the other. Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed." *Id.*, at 444.

[41] See pp. 11-13 *supra*.

hibits grossly unconstitutional discriminations[50] which the courts have been unable to control or correct. We put aside, for present purpose, the question whether a state is federally obligated to provide at least some minimal form of judicial review of a jury's determinations;[51] or whether, if its highest court freely reviews jury-fixed sentences in non-capital cases (as does Arkansas'), it may deny all power of review in capital cases alone.[52] The point we make here is that a total absence of standards to govern the jury's decision-making function—a defect that would defeat any meaningful judicial review which is allowed—is the more baneful, if possible, where there is no judicial review. The jury makes the one and only judicial decision that a capital defendant is allowed on the question whether he lives or dies; and makes that decision entirely arbitrarily.

B. *The Grant of Lawless Power in Capital Sentencing is Unconstitutional.*

We submit that the practice just described violates the rule of law basic to the Due Process Clause. The same submission was recently made to the Supreme Court of California, which rejected it by a vote of four Justices to three. *In re Anderson,* —— Cal.2d ——, 447 P.2d 117, 73 Cal. Rptr. 21 (1968). Justice Tobriner, joined by Chief Justice Traynor and Justice Peters, dissented in an opinion that states our position with incomparable lucidity. It was the view of the dissenters that the California statutes granting unfettered discretion to juries in capital sentencing

> "violate the Fourteenth Amendment of the Constitution of the United States because they provide no

[50] See pp. 13-20 *supra.*

[51] Cf. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960).

[52] Cf. *Baxstrom* v. *Herrold,* 383 U.S. 107 (1966).

> standards or tests whatsoever to enable judge or jury to decide why one convicted capital defendant should die and another should live. The California penalty trial leaves this vital decision to the unguided whim and caprice of the trier of fact; this irrational process, the antithesis of due process, has no place in the constitutional structure of American law." (Tobriner, J., joined by Traynor, C.J., and Peters, J., concurring and dissenting in *In re Anderson, supra,* 73 Cal. Rptr. at 36.)[43]

We commend the reasoning of the *Anderson* dissenting opinion to this Court. After examining the nature of the power which standardless capital-sentencing legislation confers upon the jury and concluding that it requires the jury *"to perform a sui generis function which subjects the convicted capital defendant to a power of arbitrary decision"* (*Anderson Dissent,* p. 40 (original emphasis)), the opinion states the constitutional premise against which such a power must be judged:

> "The constitutional imperative that laws infringing upon life and liberty be framed in terms of reasonably ascertainable standards is central to our administration of criminal justice." (*Anderson Dissent,* p. 42.)

Surely, this proposition is beyond dispute. For whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision-making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject

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[43] The dissenting opinion is at 73 Cal. Rptr. 36-59. We shall hereafter cite it as *Anderson Dissent,* p. . . ., referring to the pages in 73 Cal. Rptr.

should not be taken but by the law of the land. This Court has long condemned the sort of vagueness in criminal statutes that "licenses the jury to create its own standard in each case," *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Winters* v. *New York*, 333 U.S. 507 (1948). Statutes which authorize *ad hoc* adjudications unconstrained by legal principles of general application thereby confer a "naked and arbitrary power" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 366 (1886)), which is at war with Due Process. The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and the influence of impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUPREME COURT REVIEW 101, 110; Note, 109 U. PA. L. REV. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

The *Anderson* dissent points out that this basic principle of legality, of the rule of law, is no less applicable to a court's sentencing function than to its guilt-determining function. It notes this Court's recent explicit recognition in *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968), that while sentencing choice—and, in particular, the choice of life or death—may be:

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the

traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Witherspoon, say the Anderson dissenters:

"therefore squarely stands for the proposition that the requirements of the Fourteenth Amendment—those that go to the very fairness and integrity of the penalty-determining process—apply to the procedure pursuant to which the state, be it by judge or jury, takes the life of a capital offender." (*Anderson Dissent*, p. 40.)

And other recent decisions of the Court point ineluctably to the same conclusion. See cases cited at p. 27 *supra*.

The question, then, is whether an unlimited grant of arbitrary power to make the life-or-death sentencing choice falls afoul of the Fourteenth Amendment's requirements that "go to the very fairness and integrity of the penalty-determining process." The *Anderson* dissenters conclude, and we here submit, that it does, for several reasons.

First, the totally undefined issue that is presented for the jury's decision makes it impossible for the defendant, whose life is at stake, advisedly and intelligently to prepare and present his defense on the sentencing question. We shall see in Part II of this brief, pp. 66-78 *infra*, that the single-verdict trial procedure in capital cases immeasurably exacerbates the unfair litigation posture in which the defendant is put, by requiring him to fashion his case in a manner that sets at loggerheads his interests in a fair trial of the guilt question and a sound penalty determination. But, even without this additional handicap, the capital defendant who confronts a jury armed with unconfined and unguided power to sentence him to life or death is denied the least semblance of a fair trial on the matter of penalty. This Court has long recognized the

"principle of procedural due process . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). See *In re Gault*, 387 U.S. 1, 33-34 (1967). Even in non-criminal matters, the Court has found a Due Process right to adequate notice of the issues posed for adjudication in a proceeding affecting individual interests. E.g., *Holden* v. *Hardy*, 169 U.S. 366, 389 (1898); *Morgan* v. *United States*, 304 U.S. 1 (1938); *Gonzales* v. *United States*, 348 U.S. 407 (1955). *A fortiori*, such notice and an "opportunity to be heard" are required in the sentencing phase of a criminal case, *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967), particularly where the jury is "empowered . . . to answer 'yes' or 'no' to the question whether this defendant [is] . . . fit to live," *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968). But without rules of decision "sufficiently definite to guide the lawyer in contesting their applicability to his client . . . , the right to a hearing would be of little value, because there would be no adequate standards toward which argument and evidence could be directed." Note, 62 HARV. L. REV. 77, 78 (1948).[14]

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[14] The *Anderson Dissent*, p. 44, n. 9 quotes the following passage from this Harvard Note, which identifies the two due process concerns that are at the core of the present case:

"'[D]ue process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.

"'Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would

It would be fair to describe the defendant's situation in a capital trial as a deadly guessing game. He cannot know what facts or positions will save him or cost him his life.[14] The legislature has not told him, or told the jury, when capital punishment is to be imposed or why it is to be imposed; and the jurors are free to take their own views. Views on capital punishment being what they are in our society, and the justifications for the death penalty being rather obscure matters of personal taste in the absence of some legislative specification, the jurors' attitudes will range wildly. A defense of consent which may not convince the jury to acquit the defendant may nevertheless lead it to the conclusion that—because the prosecutrix was less than firm in her resistance—the defendant should not be executed. Or the jury may think the degree of resistance by the prosecutrix irrelevant. Particularly where the defendant is Negro and the prosecutrix white, the defense of consent may cause the jury to execute the defendant for the unpardonable offense of adding slander to rape. Given its grisly risks, how is counsel to know what he stands to gain by making the defense?

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be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness; a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same—to test application of rules to particular situations.' (Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv. L. Rev. 77-78.)"

[14] "We must assume that in establishing the alternative punishments of death and life imprisonment rather than setting down one mandatory punishment, the Legislature concluded that not all capital offenders should be punished by the extreme penalty. . . . Yet the current administration of the death penalty, by failing to provide criteria sufficiently ascertainable to guide courts and juries in making that distinction, prevents a convicted capital defendant from knowing how to show that he falls within the class of capital offenders for whom the law contemplates the lesser penalty of life imprisonment." *Anderson Dissent*, p. 44.

If the defendant was under the influence of alcohol or drugs, the jury may take the view that that is a mitigating incident—or an aggravating one. Five jurors may have sympathy for a defendant who displays a severe mental or emotional disorder not amounting to legal insanity; while seven, who would reserve the death penalty for just such perverted savages, vote to kill him for his disorder. See *People* v. *Hines*, quoted at pp. 40-41, *supra*. The result is not a litigation in any ordinary sense but a flailing contest or a gambling escapade in which the wages of a misplaced guess are death. This is simply not a Due Process trial. See *Anderson Dissent*, pp. 43-44.

Second, "the complete absence of standards in the administration of the death penalty deprives the convicted capital defendant of any way to protect himself against an arbitrary imposition of the death penalty. Since no limitations bound the exercise of the discretion of the trier of fact, the defendant can neither challenge the evidence introduced . . . on the ground of insufficiency nor seek review on the ground of erroneous application of the death penalty to him." *Anderson Dissent*, p. 44. Standardless death-sentencing thus effectively strips the convicted capital defendant of all of the safeguards of the Constitution in connection with the life-or-death penalty decision. Jurors may inflict death upon him for reasons or by processes forbidden by the clearest constitutional commands, and yet get away with it. The inability of the district and circuit courts below to come to grips with petitioner Maxwell's contention of racial discrimination is a striking example of how constitutional protections founder in the sea of limitless discretion that envelops and conceals the jury's decision-making process. The district court avoided Maxwell's compelling statistical showing of racially discriminatory sentencing patterns on the part of Arkansas juries by assuming that the factors which might be affecting the jurors

in their selection of the men sentenced to die were so subtle and complex that statistics could not take account of them all. (See A. 39-40.) Thus, although the court itself found as a fact that Negroes convicted of the rape of white victims were disproportionately frequently given death sentences, and although it was uncontested that no non-racial factor of which analysis was possible on the basis of an exhaustive empirical study could explain the racial death-sentencing differential, the court was able to imagine factors that must have escaped identification or measurement and that could account for the differential.[44] Perhaps. Such is the range of freedom in the jurors' sentencing decision that almost any speculation is possible.

The court of appeals took a somewhat more hard-headed view of the evidence and did not really deny that petitioner had proved a state-wide practice of racial discrimination. It rejected his Equal Protection contention principally on the ground that the particular jury which sentenced Maxwell to die had not been shown to have a discriminatory motivation. (A. 59-64.) Doubtless this last conclusion is factually correct. Since, under Arkansas law, Maxwell's jurors could have had almost anything in mind—or nothing in mind—to support their death verdict, it is quite impossible to say.

It has been pointed out that one of the purposes of the Due Process requirement of definiteness in penal legislation is to delimit "to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens and, second, makes virtually inefficacious the federal judicial machinery established for the vindication of those rights." Note, 109 U. Pa. L. Rev. 69, 81 (1960). The

[44] *Viz.*, the "issue of consent" discussed at A. 40.

function of courts to protect against the deprivation of specific constitutional guarantees—such as the guarantee against racial discrimination—"requires at the least a continued surveillance to assure the regularity of legislated and administered modes of applying public compulsion to all particular men. It requires, as a corollary, the maintenance of a state of institutions in which that surveillance is kept effective." *Id.*, at 89. If ever a form of penal enactment flouted these requirements, and thereby established a regime of administration in which nothing was certain but that denials of federal rights would go undetected and uncorrectible, standardless death-sentencing legislation is that form.

Third, the arbitrary power which this legislation confers to differentiate among convicted rape defendants by sentencing some to life and some to death for any or no reason violates a constitutional concern in regard to which "the equal protection and due process clauses of the Fourteenth Amendment overlap." *Anderson Dissent*, p. 47. This is the concern for even-handed treatment which allows "no invidious discriminations between persons and different groups of persons," *Griffin* v. *Illinois*, 351 U.S. 12, 17 (1956), and ordains that all shall " 'stand on an equality before the bar of justice in every American court,' " *ibid.*, quoting *Chambers* v. *Florida*, 309 U.S. 227, 241 (1940). A corollary of these propositions is that differences in the treatment of individuals by the courts must have some rational basis: that is, there cannot be differentiations without differences, nor differentiations along lines of difference that have no rational relation to the purpose for differentiating. E.g., *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Baxstrom* v. *Herrold*, 383 U.S. 107 (1966). Particularly where "legislation . . . involves one of the basic civil rights of man . . . , strict scrutiny of the classification which a State makes . . . is essential, lest unwittingly or otherwise,

invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

The *Skinner* case held that a state could not, by legislative classification, draw the line of sexual sterilization between thieves and embezzlers. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made . . . [a constitutionally forbidden invidious discrimination]." *Id.*, at 541. We take it that, under *Skinner*, a state could not constitutionally draw the line of death between thieves and embezzlers either; nor could it permit its juries to draw so irrational a line in the exercise of a general death-sentencing discretion. If this is so, it is difficult to conceive how Arkansas may give its juries *arbitrary* power—which necessarily includes the competence to draw lines as unsubstantial as the line between thieves and embezzlers, or more unsubstantial still—without falling afoul of the same constitutional interdiction.

This is not to say, of course, that a state may not constitutionally provide for differential sentencing of offenders convicted of the identical offense. There is no inconsistency whatever between the principle of equality and a procedure for individualizing sentencing—even death sentencing. "Equality and individualization go together; they complement each other. They are of one piece." [57] This is so because any system of individualization that efficiently serves the penal interests of the state must necessarily be based upon some rational scheme for differentiating among offenders; and if the bases of differentiation are rational,

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[57] Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 69 (1966).

the Fourteenth Amendment is satisfied. The trouble with standardless death-sentencing legislation is that it authorizes *irrational* differentiation.[48] By

> "providing no classificatory criteria whatsoever, [it] permits the trier of fact *arbitrarily* to determine whether [a] particular convicted capital defendant should suffer death rather than life imprisonment. Such absence of classification renders the current procedure insufficient to satisfy even the *minimum* requirement of the equal protection clause that differential treatment of persons prima facie similarly situated must bear some rational relation to a discernible legislative purpose. In failing to provide any rational basis upon which to justify an imposition of the death penalty on those particular capital defendants sentenced to death rather than life imprisonment, [standardless death-sentencing statutes make an invidious discrimination]. . . . 'It is clearly unconstitutional to enable a public official [let alone an ad hoc group of 12 individuals][49] to * * * engage in invidious discrimination among persons or groups * * * by use of a statute providing a system of broad discretionary * * * power.' (Cox v. State of Louisiana, . . . 379 U.S. 536, 557

[48] "Recognition of the problem created by disparate sentences does not, however, compel the conclusion that all offenders who commit the same offense ought to receive the same sentence—the theory of 'uniform sentencing.' There may be differentiating personal and social factors which require 'individualization'—different sentences for offenders who have engaged in the same anti-social conduct. But if a system of individualization is to satisfy objections against disparity, the disparity inherent in individualization must result from the articulated application of uniform criteria designed to effectuate agreed-upon goals." Note, 69 YALE L.J. 1453, 1459 (1960).

[49] This bracketed insertion is by the author of the *Anderson* dissent. The others in the passage are ours. Emphasis throughout is found in the original.

> [1965] . . . ; Yick Wo v. Hopkins, . . . 118 U.S. 356, 366-368 [1886] . . . .) Thus, the trier of fact's absolute power to impose the death penalty on a convicted capital defendant violates the basic interdictment of the equal protection clause that no person shall hold 'a naked and arbitrary power' to make invidious discriminations against another. (Yick Wo v. Hopkins, supra, 118 U.S. at pp. 366-368 . . .)" (*Anderson Dissent*, pp. 49-50.)

Fourth, and most fundamentally, the process of the standardless death-sentencing decision subjects the defendant to an exercise of legally unregulated power which is antithetical to the rule of law expressed by Due Process.

> "The epitome of the vice of absence of procedural safeguards inherent in vague and standardless statutes thus permeates the administration of the death penalty: the defendant sentenced to death cannot even show that an ad hoc group of 12 jurors . . . exercising absolute power over his life abused this discretion. [The statutes giving the jury such power] . . . thus deny due process of law because they provide no standards by which an abuse of discretion by the trier of fact can be curbed or even subjected to review. The power of the trier of fact to decree the death sentence is as broad and arbitrary as it is absolute and untouchable." (*Anderson Dissent*, p. 44.)

In this aspect, what is constitutionally wrong with standardless death-sentencing is that it collides violently with a principle so basic that it hardly ever is or needs to be explicitly asserted, because our entire system of law assumes it. It is the principle of legality. Standardless death-sentencing is its opposite: arbitrariness. In order to protect against the regime of arbitrariness, the fabric of

our legal structure—laws, Constitution, and courts—has been established. The function of the structure, to maintain the rule of law, has as its one most essential objective to deny arbitrariness entrance to the system. For "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

Under the principle of legality, it could scarcely be contended that an Arkansas statute would be valid which provided: "Whoever is found condemnable in the discretion of the jury shall be guilty of an offense." [*] Yet we submit

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[*] See PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) 92-94:

"Let us suppose for a moment that a legislature, contemplating the momentous problem of drafting a new criminal code, decided to solve its problem by a single grand enactment: whoever does anything bad shall be punished as justice may require. When a court is called upon to decide whether John Jones, who hit his neighbor over the head with a hammer during the course of an argument, has violated the statute, is the court making law or is it applying law? The question is absurd, of course. In a sense, the court is doing both. But the significant question, which is concealed by categorical treatment of law-making and law-application, is: how great a degree of freedom is the court allocated in deciding whether to treat John Jones's conduct as criminal? The extremity of the example makes the issue clear. . . . It hardly needs argument that the hypothetical criminal enactment just proposed —whoever does anything bad shall be punished as justice may require—does violence to the principle of legality. As the example shows, it is not enough that the law formally being applied is law in existence at the time the conduct complained of occurred. Devices are needed to ensure that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits. But the working out of the devices and the decision about what limits are tolerable are functions that fall to the courts. It is, of course, no accident that they fall to the courts; neither, however, is it the result of any

that this suppositious statute stands no differently in light of the relevant concerns of Due Process than the unregulated sentencing practice under which Arkansas juries condemn some but not other men to die. The statute and the sentencing practice have an indistinguishable vice: both permit adjudications that take away a man's liberty or his life on an entirely *ad hoc* basis, without reference to rules of decision that have ever been applied, or will ever be applied, to any other man. When selection among individuals for the purpose of killing some of them is made in this fashion—according not to laws of general application but simply to the caprices of moment-to-moment, arbitrary opinions[61]—more is wrong than that the men selected to die are treated *unequally* as compared with the rationally undifferentiated men selected to live, or that the men selected to die are treated *irrationally* with regard to any purpose that might be advanced for the selection process or its lethal consequences. What is wrong, more essentially, is that the men selected to die are treated *lawlessly*. "Certainly one of the basic purposes of the Due Process Clause

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omnicompetent lawgiver's deliberate plan. It is, very simply, an institutional necessity. . . .

". . . The devices worked out by the courts to keep the principle of legality in good repair comprise a cluster of doctrines that give the criminal law much of its distinctive content. For our purposes it is enough to identify and describe two of these doctrines, which fairly represent the values involved. They are the void-for-vagueness doctrine and the doctrine requiring strict construction of penal statutes. . . .

"Under the vagueness doctrine in its starkest form, the court says to the legislature: you have given so much discretion in picking and choosing among the various kinds of conduct to which this statute may be applied that we will not let it be applied at all. That is unquestionably the response that an American court would give to the prosecution of John Jones under the hypothetical bad conduct statute discussed above."

[61] Cf. Mr. Justice Black, concurring, in *Cox* v. *Louisiana*, 379 U.S. 536, 579 (1965), approved in *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90 (1965).

has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966).

It is true, of course, that the "whoever-is-found-condemnable" statute deals with the definition of crime, while Arkansas' sentencing practice regulates the degree of punishment for crime. Questions of "fair notice" that are implicated in crime-defining provisions are not necessarily involved in provisions relating to penalty alone. But, as we have said above, the Due Process requirement of definiteness in penal laws is not simply a command of notice; it is also a command of regularity. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963); Note, 109 U. Pa. L. Rev. 67, 90 (1960). We think it obvious that "whoever-is-found-condemnable" is constitutionally bad not principally because a man does not know how to behave consistently with it, but because—however he behaves—he may be arbitrarily and capriciously taken by the heels. The fault of that sort of statute is that it "injects into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically—responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society. ..." *Ibid.* The precise vice inheres in wholly unregulated jury discretion to sentence a convicted man to life or death. He too may be dealt with arbitrarily, his life extinguished for any reason or for none at all.

Giaccio v. *Pennsylvania, supra,* supports, if it does not compel, the conclusion that Arkansas' standardless grant of discretion to its juries in capital sentencing is unconstitutional. What was at issue there, as here, was a state practice governing disposition. No "fair notice" problem was involved—except, of course, the problem present in at

least an equal degree in a capital case tried to a jury with limitless sentencing power[62]—that it was impossible at the trial to know what issues were being tried. But this procedural deficiency, however important, was not the crux of *Giaccio*. That decision turned squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards," 382 U.S. at 402-403, whether to impose upon a defendant a rather small item of costs.[63] It is not evident why, in the infinitely more significant matter of sentencing men to death, Arkansas juries can be permitted the same lawless and standardless freedom.

Nor does footnote 8 in the *Giaccio* opinion, relied upon by both courts below,[64] blunt the implications of the *Giaccio* holding for our present purposes. In that footnote, the Court said that it intended to cast no doubt upon the constitutionality of leaving to juries finding defendants guilty of a crime the power to fix punishment "within legally prescribed limits." The problem in this case is precisely that there were no "legally prescribed limits," in any realistic sense, to the jury's discretion. The *Giaccio* footnote speaks for jury sentencing generally, not capital sentencing. But, once again:

> "It should be understood that much more is involved here than a simple determination of sentence. For the State . . . empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant

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[62] See pp. 48-51 *supra*.

[63] It should be noted that no First Amendment rights or other preferred federal guarantees demanding the special protection afforded by a heightened requirement of statutory specificity, see *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963), were involved in *Giaccio*.

[64] See A. 32, 67.

was fit to live." (*Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968).)

Given the imprecision of the sentencing art, even when performed by judges, see *Tigner* v. *Texas*, 310 U.S. 141, 148-149 (1940), it may well be that juries can constitutionally be given some discretion in selecting a smaller or larger fine, a longer or shorter term of years, particularly where the range of choice is relatively circumscribed and the effect of the choice is somewhat qualified by parole statutes and the continued availability of post-conviction process to rectify after-discovered mistakes made at the trial. But the degree of arbitrariness allowed a State is not so liberal where grave and irremediable punitive exactions are at stake, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); and none is graver or more irremediable than the sentence of death by electrocution.

Nor did the Court in *Giaccio*, adverting to the problem of jury sentencing, have before it what has been presented here: evidence showing that in fact the capital sentencing discretion given juries has been exercised on the ground of race explicitly forbidden by the Constitution. See pp. 13-20 *supra*. We have not the slightest hesitation in contending that the arbitrary and standardless discretion afforded Arkansas juries constitutes *per se* a flagrant violation of the Fourteenth Amendment. But, in addition, this discretion has "in operation displayed the latitude it [allows] . . . for discontrol, irrationality and irregularity." Note, 109 U. Pa. L. Rev. 67, 108 (1960). There can be no better demonstration of the potential, the inevitable tendency, of this sort of law than what has happened in its administration in a State where race has spelled the difference between life and death. See cases cited in note 3 *supra*.

Of course, petitioner does not contend that the Due Process Clause forbids entirely the exercise of discretion in sentencing, even by a jury and even in a capital case. Ways may be found to delimit and to guide discretion, narrow its scope and subject it to review; and these may bring a grant of discretion within constitutionally tolerable limits. Whether the approach taken by a State such as Nevada, which makes certain reviewable findings of fact the indispensable condition of imposing capital punishment,[65] or that of the Model Penal Code, which both establishes prerequisite findings and enumerates aggravating and mitigating circumstances,[66] or that of the states which provide plenary review of capital jury sentencing by trial and/or appellate courts, would be constitutional, is not the question presented. Here, Arkanses has taken none of these available steps, used none of these available devices, to hold its jurors back from the exercise of "a naked and arbitrary power," *Yick Wo* v. *Hopkins,* 118 U.S. 356, 366 (1886).

One point involved in this totally unconfined regime of discretion deserves emphasis. It is often said, and rightly, that it is a vexing and difficult job to select from among all capital offenders those upon whom death will actually be imposed. See note 47 *supra.* But by making the death penalty non-mandatory, the Arkansas legislature has assumed that such a selection can be made, and has required it to be made. Selection might be achieved in either of two ways: by leaving the matter to *ad hoc* judgment, or by formulating generally applicable principles of differentiation. A legislature may adopt the *ad hoc* approach for one or another reason. It may have no generally appli-

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[65] See note 13 *supra.*

[66] See AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6 (P.O.D. May 4, 1962), pp. 128-132.

cable principles in view, and intend that the selection be made arbitrarily. In that case, it is obviously heedless of Due Process.

Or a legislature may find the articulation of general principles too burdensome, at the same time that it hopes and expects its jurors to act rationally—to develop death-sentencing patterns that are regular and non-arbitrary. Its expectation may or may not be fulfilled: from the sum of *ad hoc* life-or-death decisions, a pattern may or may not emerge. If it does not, the legislature's product—whatever its intendment—is again heedless of Due Process.

But if a rational pattern does emerge in the *ad hoc* selective decisions of particular juries, it will be because there exist rational general principles of differentiation, to which the juries have more or less conformed. Such rational general principles, if they exist, must be expressible, definable, describable in legislation. It is hardly to be supposed that what a random, shuttling corps of legally untrained jurors can appreciate and act upon is not susceptible of formulation by a legislative body. If there are sorts or classes of cases in which the death penalty is not generally imposed, these can be identified and described; and the use of the penalty in such cases disallowed. If there are rather limited sorts of cases in which the penalty generally is imposed, these can be enumerated, circumscribed, and the penalty limited to them.[67] If these things cannot be

[67] As suggested in the text at pp. 38-45 *supra*, there are a considerable number of ways in which a legislature might choose to delimit the death-sentencing discretion of jurors. It might condition the imposition of the penalty upon specified findings of fact, whether specific (relating to the harm done the victim, the defendant's prior history of similar offenses, etc.) or general (relating to the defendant's likelihood of recidivism, his reformability, etc.). It might direct the jury's attention to enumerated aggravating circumstances. It might direct the jury's attention to enumerated mitigating circumstances, or make the finding of specified circum-

done, it is because the incidence of the death penalty is purely arbitrary. If it can be done, it constitutionally must be done, because of the significant differences, in the light of Due Process concerns, between requiring rational decision-making and hoping for it.

For even if patterns of rational sentencing choice emerge within a system of wholly unfettered discretion to choose, it is the characteristic and consequence of such a system that choices are allowed and will be made, in particular cases, in utter disregard of the pattern. Arkansas juries may generally reserve the death penalty for rationally differentiable categories of particularly heinous rapes; the Arkansas legislature may hope and expect that they will do so; but it remains the fact that any one jury may not do so, and may sentence a defendant to die because he is too young, or too old, or too sick, or too healthy, or too bumptious, or too black. With human life at stake, a system that permits this result also is heedless of Due Process.

Concededly, the goals of sentencing are complex, and in designing devices for achieving them the states must have some tolerance under the Constitution. But as the issue of petitioner Maxwell's sentence was submitted to his jury in its sole discretion under Arkansas practice, the attention of the jurors was directed to none of these goals. They were not required or invited to consider any of the purposes of criminal punishment, or any particular aspect or aspects of petitioner's conduct in relation to such pur-

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stances legally preclusive of imposition of the penalty. It might identify permissible considerations, or impermissible considerations. It might fix governing rules, criteria or principles, of greater or lesser generality. It might identify the purposes of capital punishment which should inform the development of such criteria. Or it might use a combination of these approaches, as does the Model Penal Code. See note 66 *supra*.

oses. They were not required or invited to consider the xtent of physical harm to the prosecutrix, the moral einousness of the defendant's acts, his susceptibility or ack of susceptibility to reformation, or even the appropri-teness of the deterrent effect of killing this defendant (as istinguished from any other) *"pour décourager les utres."* Cf. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1077 (1964). They were per-mitted to choose between life and death for any reason, ational or irrational, or for no reason at all—on an im-ulse, a surge of hatred, a vague distaste for petitioner or is color. In making the determination to impose the eath sentence, they acted wilfully and unreviewably, ithout guidance and without controls. Nothing therefore ssured that there would be the slightest thread of connec-ion between the sentence they exacted and any reason-ble justification for exacting it. Cf. *Skinner* v. *Oklahoma*, *upra*. To concede the complexity and interrelation of entencing goals, see *Packer, supra*, is no reason to sus-ain a procedure which ignores them all. It is futile to put orward justification for a death so inflicted; there is no ssurance that the infliction responds to the justification r will conform to it in operation. Inevitably, under Ar-ansas' death-sentencing practice, capital punishment in he few, arbitrarily selected cases where it is applied, is oth irrational and lawless. Thus it denies Due Process o the men condemned to die.

II.

Arkansas' Single-Verdict Procedure for the Trial of Capital Cases Violates the Constitution.

Arkansas' practice of submitting simultaneously to the trial jury the two issues of guilt and punishment in a capital case compounds the vice of lawless jury discretion just discussed, by making it virtually impossible for the jurors to exercise their discretion in any rational fashion.[18] Under Arkansas procedure, the jury hears evidence simultaneously on the issues of guilt and punishment, and resolves both issues at a single sitting. Under this procedure, there is no separate hearing on penalty apart from the criminal trial itself, and no opportunity for allocution or for the presentation of evidence in mitigation of sentence after the finding of guilt but prior to the life-death sentencing choice.[19]

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[18] The court of appeals below pointed out that "no request was made of the district court [sic] for a two stage trial." (A. 68.) But the court did not suggest that this amounted to the sort of intentional bypassing required to forfeit constitutional claims as against federal habeas corpus. See note 35 *supra*. Rather, it entertained and rejected petitioner's constitutional contention on the merits (A. 68-69), as had the district court (A. 40-41).

[19] The Arkansas procedure is thus described by the district court (A. 40-41):

> "Under that procedure the State puts on its evidence first, and in many types of cases, including rape cases, evidence which is relevant to guilt is also relevant to punishment. When the State has completed its presentation, the defense may or may not introduce evidence, and the defendant may or may not testify in his own behalf. If he does testify, he waives his privilege against self-incrimination with respect to the charge against him, and may be cross examined as fully as any other witness. The deliberations of the jury relate to both the question of guilt and the question of punishment; there is no post-conviction hearing before the jury as to the punishment which the defendant should receive."

The effect of this method of proceeding is obvious, and devastatingly prejudicial to the accused. He is whipsawed between his rights of allocution and to present evidence to support a rational sentencing decision, and his privilege against self-incrimination. If he wishes personally to address the jurors with respect to their decision whether he shall live or die, he can do so only at the price of taking the stand and thereby surrendering his privilege.[70] He is subject not only to incriminating cross-examination but also to impeachment[71]—a process which, in Arkansas, involves the introduction by the prosecution of an uncommonly prejudicial lot of ordure.[72] If he exercises the

[70] See note 69 *supra*.

[71] When a criminal defendant "voluntarily takes the stand as a witness in his own behalf he is subject to the same cross-examination to which any other witness might be subjected." *Dillon* v. *State*, 222 Ark. 435, 442, 261 S.W.2d 269, 273 (1953). For the application of the rule in capital trials, see *Wright* v. *State*, 243 Ark. 221, 419 S.W.2d 320 (1967); *McGuire* v. *State*, 189 Ark. 503, 74 S.W.2d 235 (1934). "'This court had adopted the rule that witnesses, including the accused, may be impeached on cross examination by drawing out the fact that they have committed other crimes and immoralities.'" *Skaggs* v. *State*, 234 Ark. 510, 511, 353 S.W.2d 3, 4 (1962) (conviction reversed on other grounds). *Accord: Rayburn* v. *State*, 200 Ark. 914, 141 S.W.2d 532 (1940) (capital case).

[72] As the *Skaggs* case, note 71 *supra*, indicates, the Arkansas law relating to impeachment permits cross examination regarding not merely prior convictions, but prior criminal acts not resulting in convictions, and other "immoralities." *Wright* v. *State*, 243 Ark. 221, 419 S.W.2d 320 (1967) (rape defendant asked whether several persons had not told him to quit hanging around their places of business because he made indecent proposals to women); *Edens* v. *State*, 235 Ark. 178, 359 S.W.2d 432 (1962) (defendant in false pretenses case asked whether he had not defrauded each of several named persons); *Willis* v. *State*, 220 Ark. 965, 251 S.W.2d 816 (1952) (homicide defendant asked whether he did not once get drunk and have a wreck and kill a boy); *Powell* v. *State*, 149 Ark. 311, 232 S.W. 429 (1921) (defendant in carnal abuse case asked whether he had not cohabited with his wife before they were married).

The sorts of misconduct which may thus be brought out are apparently limitless. They need have no real relation to the trait of

privilege, on the other hand, he risks an uninformed, arb
trary, and uncompassionate death verdict. Should he wis
to present background and character evidence to infor
the jury's sentencing choice, he may do so only at the co

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truthfulness. See, in addition to the cases cited above, the followi
exemplary cases involving capital trials: *Black* v. *State*, 215 Ar
618, 222 S.W.2d 816 (1949) (convictions for "certain misdemea
ors," including drunk driving, elicited); *Edwards* v. *State*, 2
Ark. 231, 185 S.W.2d 556 (1945) (conviction and fine on a liqu
charge elicited); *Bieard* v. *State*, 189 Ark. 217, 72 S.W.2d 5
(1934) (general reputation of the defendant three or four yea
prior to the offense adduced); *Curtis* v. *State*, 188 Ark. 36, 64 S.W
2d 86 (1933) (involvement in illicit relationship with a name
woman elicited). Although the doctrine is that misconduct whi
is too remote in time may not be elicited, at least if it does n
involve a conviction, *Dixon* v. *State*, 189 Ark. 812, 75 S.W.2d 2
(1934) (20-year old homicide), a 12- to 14-year old drunk-drivi
accident is not too remote, *Willis* v. *State, supra;* nor is a 19-ye
old juvenile conviction for auto theft, *Dillon* v. *State*, 222 Ark. 4
261 S.W.2d 269 (1953), nor a 20-year old fine on a liquor charg
Edwards v. *State, supra*. Impeachment relating to general misco
duct or specific bad acts is limited to cross examination, but pri
convictions may be proved *aliunde*. *Holcomb* v. *State*, 218 Ark. 60
238 S.W.2d 505 (1951). To the extent that ARK. STAT. ANN. §2
707 (1962 Repl. Vol.) may seem more restrictive than the rul
deseribed in this footnote, "[t]he cases do not appear to have he
to the strict language of the statute." *Id.* at 612, 238 S.W.2d at 50

The Arkansas court has shown no disposition to restrict the exh
bition of prior misconduct for the purposes of impeachment eve
where it is of such a nature as to be devastatingly prejudicial wit
regard to the crime charged. See the following cases regardin
capital trials: *Wright* v. *State, supra* (rape defendant asked abo
instances when he had been told to quit hanging around plac
because he made indecent proposals to women); *Bevis* v. *State*, 2
Ark. 624, 192 S.W.2d 113 (1946) (homicide defendant asked if h
did not shoot his first wife); *Gaines* v. *State*, 208 Ark. 293, 1
S.W.2d 154 (1945) (homicide defendant asked whether he had n
previously shot his brother-in-law and a neighbor, nearly killin
them); *Fielder* v. *State*, 206 Ark. 511, 176 S.W.2d 233 (194
(homicide defendant asked whether he did not shoot two other m
to death); *Ham* v. *State*, 179 Ark. 20, 13 S.W.2d 805 (1929) (hom
cide defendant asked whether he had not killed a man a few da
ago); *McGraw* v. *State*, 184 Ark. 342, 42 S.W.2d 373 (1931) (defe
dant, charged with wife's homicide, asked whether he had n
previously killed his wife's step-father).

of opening the question of character generally prior to the determination of guilt or innocence, thereby risking the receipt of bad-character evidence[73] ordinarily excludable because highly prejudicial on the guilt question.[74] Or he may avoid that risk of prejudice by confining the evidence at trial to matters relevant to guilt, letting the jury sentence him to life or death in ignorance of his character.

A procedure of this sort in unconstitutional, both because it results in a fundamentally unfair trial and because it infringes the several federal constitutional rights which it sets at loggerheads. To appreciate why this is

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[73] Arkansas follows the ordinary rules permitting the cross examination of a defense character witness in the "have you heard" form which permits the eliciting of every prejudicial occurrence, real or imagined, in the defendant's history. See *Amos* v. *State*, 209 Ark. 55, 189 S.W.2d 611 (1945); *Clark* v. *State*, 135 Ark. 569, 205 S.W. 975 (1918). The prosecution may also elicit the defendant's bad reputation in regards to traits broader than those which the defendant's character witness bolstered. See *Weakley* v. *State*, 168 Ark. 1087, 273 S.W. 374 (1925).

[74] In Arkansas, as elsewhere, the prosecution is forbidden to open the question of the defendant's character, or to develop bad-character evidence in his case-in-chief. See, e.g., *Long* v. *State*, 240 Ark. 687, 401 S.W.2d 578 (1966); *Browning* v. *State*, 233 Ark. 607, 346 S.W.2d 210 (1961); *Rand* v. *State*, 232 Ark. 909, 341 S.W.2d 9 (1960). Unless the defendant testifies or opens the character question, evidence of prior crimes is inadmissible. *Bonds* v. *State*, 240 Ark. 908, 403 S.W.2d 52 (1966); *Rhea* v. *State*, 226 Ark. 664, 291 S.W.2d 521 (1956). Of course, Arkansas has the usual exceptions relating to proof of intent, motive, *modus operandi*, etc., e.g., *Osborne* v. *State*, 237 Ark. 5, 371 S.W.2d 518 (1963); but these rules were exhaustively considered in *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954), and there delimited in such a way as to make prior crime evidence inadmissible in the ordinary rape case. Under *Alford*, prior-crime evidence would also be inadmissible—again, unless the defendant takes the stand or opens the character question—in the ordinary murder case. *Moore* v. *State*, 227 Ark. 544, 299 S.W.2d 838 (1957). Compare *Ward* v. *State*, 236 Ark. 878, 370 S.W.2d 425 (1963) (sexual perversion); *Gerlach* v. *State*, 217 Ark. 102, 229 S.W.2d 37 (1950) (assault with *intent* to rape).

so, one must begin by recognizing what this Court has several times said, that much evidence which is not relevant to the issue of guilt of the charge for which the capital accused is on trial—evidence which, indeed, is prejudicial and inadmissible on the issue of guilt—is highly relevant to a non-arbitrary decision on the question of punishment. "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams* v. *New York*, 337 U.S. 241, 247 (1949); see also *Williams* v. *Oklahoma*, 358 U.S. 576, 585 (1959); *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968). *A fortiori*, a jury engaged in the task of determining whether a defendant shall live or die needs much information that cannot and should not be put before it within the confines of traditional and proper limitations on the proof allowable as going to guilt or innocence. It is fair to say that the overwhelming weight of considered contemporary judgment concurs in the conclusion that, whether discretionary death sentencing be done by a judge or jury, it is the imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely or permissibly forthcoming on trial of the guilt issue. E.g., HOUSE OF COMMONS SELECT COMMITTEE ON CAPITAL PUNISHMENT, REPORT (H.M.S.O. 1930), para. 177; ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, REPORT (H.M.S.O. 1953) (Cmd. No. 8932), 6, 12-13, 195, 201, 207; AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft. No. 9 (May 8, 1959), Comment to §201.6 at 74-76; NEW YORK STATE TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT (Leg. Doc. 1963, No. 8) (February 1, 1963), 15-16; H.L.A. Hart, *Murder and the Principles of Punishment:*

England and the United States, 52 Nw. U.L.Rev. 433, 438-439 (1957); Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U.Pa. L.Rev. 1099, 1109, 1135-1136 (1953); Handler, *Background Evidence in Murder Cases,* 51 J. Crim.L., Crim. & Pol. Sci. 317, 321-327 (1960).

The single-verdict procedure therefore confronted petitioner, on trial for his life, with a gruesome Hobson's choice:

Petitioner had a crucial interest—amounting, indeed, to an independent federal constitutional right, see *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942)—that his sentence be rationally determined. The Constitution guaranteed him, also, certain procedural rights in this sentencing process: *inter alia,* "an opportunity to be heard . . . and to offer evidence of his own." *Specht* v. *Patterson,* 386 U.S. 605, 610 (1967); *Mempa* v. *Rhay,* 389 U.S. 128 (1967). As the basis for a rational sentencing determination, he would want to present to the sentencing jurors evidence of his history, his character, his motivation, and the events leading up to his commission of the crime of which he was guilty (if he was guilty). The common-law gave him a right of allocution which is an effective vehicle for this purpose, as well as for a personal appeal to the jurors, where capital sentencing is discretionary. This Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command.[15]

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[15] *Hill* v. *United States,* 368 U.S. 424, 428-429 (1962); see *Andrews* v. *United States,* 373 U.S. 334, 336-337 (1963). Acting on these opinions, several circuit courts have found allocution a constitutional right. *Green* v. *United States,* 313 F.2d 6 (1st Cir. 1963), *cert. denied* 372 U.S. 951 (1963); *United States* v. *Johnson,* 315 F.2d 714 (2d Cir. 1963), *cert. denied,* 375 U.S. 971 (1964); *Behrens* v. *United States,* 312 F.2d 223 (7th Cir. 1962), *aff'd,* 375 U.S. 162 (1963).

The *Hill* case holds that, absent "aggravating" circumstances (368 U.S. at 429), failure of a sentencing judge to invite the

But to exercise his right of allocution before verdict on the guilt issue, petitioner was required to forego his constitutional privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965). He was required to take the stand and be subjected to cross-examination that could incriminate him.[18]

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defendant to exercise his right of allocution does not violate due process. But *Hill* was not a capital case, nor a case in which counsel was denied the right to present pertinent information to the sentencer, nor "a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed . . . [nor where the sentencer] was either misinformed or uninformed as to any relevant circumstances . . . [nor where it was even claimed] that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* In an Arkansas capital case, the following "aggravating circumstances" are presented: (A) the circumstances that the right of allocution has had unique historical significance in capital cases, see *Couch* v. *United States*, 235 F.2d 519, 521 (D.C. Cir. 1956) (opinion of Judge Fahy); *Coleman* v. *United States*, 334 F.2d 558, 566 (D.C. Cir. 1964) (opinion of Judges Burger and McGowan); (B) the circumstance that in capital cases matters which may affect the sensitive discretion of the jury in its life-death choice are traditionally viewed with a stricter eye to possibilities of prejudice than are other matters in the criminal process, see *People* v. *Hines*, 61 Cal. 2d 164, 390 P.2d 398, 37 Cal. Rptr. 622 (1964); (C) the circumstance that Arkansas' single verdict procedure "affirmatively" denies a defendant his opportunity to address the jury on sentence, within the meaning of *Hill, supra;* (D) the circumstance that, for the reasons set out above in text, a jury making a capital sentencing choice on no other information than the trial of the guilt issue allows is invariably "either misinformed or uninformed" within the meaning of *Hill;* (E) the circumstance that, under the Arkansas procedure, not only is the defendant denied the right to make a personal statement without giving up his constitutional privilege against self-incrimination, but he is similarly denied the right to have his counsel supply evidence on the sentencing issue without incurring the risks of prejudice on the guilt issue, see the *Johnson* and *Behrens* cases cited, *supra;* also *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957).

[18] Even apart from cross-examination, allocution before verdict of guilt destroys the privilege, for much of the value of the defendant's personal statement to his sentencer derives from its spon-

He declined to surrender the Privilege, and did not address the jury. (A. 41.) The jurors who sentenced him to die therefore had neither heard his case for mercy, nor even the sound of his voice.

United States v. *Jackson*, 390 U.S. 570 (1968), holds that the exercise of the Fifth Amendment privilege in criminal trials may not be penalized or needlessly burdened. Simultaneous submission to the jury of the guilt and death penalty issues results in just such a needless burden. The burden is the obvious and onerous one that the defendant must go to his death like a dumb animal, forbidden to plead his case and incapable even of impressing the human quality of his voice on his sentencing jury. It is a needless burden because the State has ample means to avoid it by, for example, a bifurcated jury trial, judge sentencing, or the elimination of the death penalty. Consistently with *Jackson*, *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), points the way to condemnation of the "undeniable tension" between constitutional rights presented here. The question in *Simmons* was whether a defendant might be obliged either to give up what he believed to be a valid Fourth Amendment claim or "in legal effect, to waive his Fifth Amendment privilege against self-incrimination"; and this Court there held it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Ibid.*

But the single-verdict practice which petitioner challenges presents grave problems in addition to this conflict between the right of allocution and the privilege. If the defendant

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taneity, see *Green* v. *United States*, 365 U.S. 301, 304 (1961) (opinion of Mr. Justice Frankfurter). This same spontaneity—unguided by the questions of counsel—leaves the defendant impermissibly unprotected as he appears before a jury which has not yet decided on his guilt. *Cf. Ferguson* v. *Georgia*, 365 U.S. 570 (1961).

seeks to present to the jury evidence of his background and character, apart from his own statement, the prosecution may counter with evidence of the defendant's bad character, including evidence of unrelated crimes. The prohibition which ordinarily keeps this sort of evidence from the trial jury sitting to determine the issue of guilt is "one of the most fundamental notions known to our law," *United States* v. *Beno*, 324 F.2d 582, (2d Cir. 1963), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence," *Lovely* v. *United States*, 169 F.2d 386, 389 (4th Cir. 1948); see *Marshall* v. *United States*, 360 U.S. 310 (1959). Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment, and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law. Compare *United States ex rel. Scoleri* v. *Banmiller*, 310 F.2d 720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963), with *United States ex rel. Rucker* v. *Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963). In any event, the possibility that the background information will be strongly prejudicial forces a defendant to a "choice between a method which threatens the fairness of the trail of guilt or innocence and one which detracts from the rationality of the determination of the sentence." AMERICAN LAW INSTITUTE, MODEL PENAL CODE, *supra* at 64.

In this aspect, the practice of simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The New York practice was, of course, struck down in *Jackson* v. *Denno*, 378 U.S. 368 (1964), where the Court recognized that joint jury trial of the two issues prevented either from being "fairly and reliably

determined." 378 U.S. at 389; see *id.* at 386-391. One fault of the practice was that:

> "... an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. .... Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. (378 U.S. at 389 n. 16)."[11]

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[11] To the extent that petitioner's argument on this branch of his case draws sustenance from the radiations of the rule of *Jackson* v. *Denno*, text, *supra*, his argument is not weakened by *Spencer* v. *Texas*, 385 U.S. 554 (1967), cited by the court of appeals. The *Spencer* decision dealt with the Texas procedure for determining the punishment decreed under its recidivist statutes, pursuant to which a jury trying a criminal defendant was informed by a reading of the indictment that the defendant had been convicted of prior crimes, and evidence was introduced in support of these allegations during the course of trial. The procedure was attacked on the ground that it unduly prejudiced the defendant on the issue of guilt, in violation of the Due Process Clause. In rejecting this attack, the Court held, *inter alia*, that *Jackson* v. *Denno* did not require a two-stage jury trial for invocation of a state's habitual offender statute and that "the emphasis [in *Jackson*] was on protection of a specific constitutional right and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury," 385 U.S., at 565.

But no more "specific constitutional right" can be imagined than that which prohibits the state's taking of petitioner's life pursuant to a sentencing process which is irrational because sentencing choice is made without information essential to the choice, *Skinner* v. *Oklahoma, supra; Specht* v. *Patterson, supra.* And though the Court in *Spencer* read *Jackson* as not broadly requiring a two-stage jury proceeding whenever evidence of prior crimes which might possibly prejudice the jury's determination of the guilt issue is presented at the trial (because of the justifications generally accepted for permitting such evidence—see 385 U.S., at 560-61), Jackson's holding that "a general jury verdict [is] not a reliable vehicle for determining the issue of voluntariness [of a confession] because jurors might have difficulty in separating the issue of voluntariness from that of guilt or innocence," 385 U.S. at 565, is unimpaired. See *Burgett* v. *Texas*, 389 U.S. 109 (1967):

And see *Bruton* v. *United States*, 391 U.S. 123 (1968).

It is in precisely the same manner that single-verdict capital sentencing tends either to make trials of guilt unfair—by forcing the defense to present evidence potentially helpful on the punishment issue and prejudicial on the issue of guilt—or to produce the unfair result that men are sentenced to death "upon less than all of the relevant evidence" if the defense declines to take that risk.[73]

Simmons v. *United States*, text, *supra*. That, by analogy, applies with equal, if not greater force to the jury's determination of the issues of guilt and sentence in a capital case. The "specific remedy" for reliably determining these issues enjoined on the courts by *Jackson*, reinforced by *Sims* v. *Georgia*, 385 U.S. 538 (1967), and endorsed by *Spencer* is that of separate consideration of the issues.

Moreover, there are crucial differences between the situation presented here and that presented by the practice challenged in *Spencer*. First, the sole claim urged by the petitioners in *Spencer* was that the introduction of prior crime evidence before jury verdict on the guilt issue unduly prejudiced the defendant on that issue (385 U.S. at 559, 567) and was therefore unconstitutional per se. Petitioner's submission here differs. The effect of the single-verdict sentencing procedure which he challenges is to confront a capital defendant with the grim specter of having to sacrifice one or another of his precious constitutional rights, either allocution or self-incrimination. By whatever choice he makes, he is prejudiced on either the issue of guilt or sentence; and he must decide—with his life at stake—which kind of prejudice to invite. Cf. *Whitus* v. *Balkcom*, note 78, *infra*. Also, while in *Spencer* the juries were given limiting instructions to guide their consideration of the prior crime evidence on the guilt issue, the jury's discretion in sentencing choice under Arkansas law is not limited or regulated in any way. See pp. 24-45, *supra*. Hence there is more than "the possibility of some collateral prejudice" (385 U.S. at 564) which the Court in *Spencer* thought not of sufficient gravity to condemn the procedure there attacked.

Finally, the Arkansas procedure has been shown on this record to have resulted in a pattern of racially discriminatory death sentencing. This goes far toward satisfying the concern of the *Spencer* court over the lack of a convincing showing of prejudice.

[73] Such a "'grisly,' hard, Hobson's choice" is itself so unfair as to violate due process. See *Whitus* v. *Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

This latter alternative was the course of Maxwell's trial, and its result. Not only, in such a case, is the jury empowered to act arbitrarily, see pp. 24-65, *supra;* it is virtually compelled to do so for want of information upon which nonarbitrary choice can be based. In short, although the Due Process Clause guaranteed Maxwell a fair trial on the issue of punishment, *e.g., Townsend* v. *Burke,* 334 U.S. 736 (1948), as well as on the issue of guilt, *e.g., Irvin* v. *Dowd,* 366 U.S. 717 (1961), the single-verdict procedure employed in his case required him to purchase the second of these at the cost of the first. Cf. *Fay* v. *Noia,* 372 U.S. 391, 440 (1963).

As the question in *United States* v. *Jackson,* 390 U.S. 570 (1968), was whether the provision of the federal kidnaping statute reserving the infliction of the death sentence to the exclusive province of the jury "needlessly encourages" guilty pleas and jury waivers and therefore "needlessly chill[s] the exercise of basic constitutional rights," 390 U.S., at 582, 583, so the question here is whether the simultaneous trial of guilt and punishment *needlessly encourages* the waiver of the right to remain silent or *needlessly chills* the right to put in evidence relevant to rational sentencing and the right of allocution. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 582. We submit the answer to the question is clear, in light of the ready availability of alternative modes of procedure not involving the same destructive collision of the defendant's rights—such as the split-verdict procedure now in use in a number of jurisdictions[19] and uni-

[19] A man tried on a capital charge in California, Connecticut, New York, Pennsylvania and Texas receives first a hearing on innocence or guilt; then, after a finding of guilt, a separate hearing

formly recommended by modern commentators, see *Frady* v. *United States*, 348 F.2d 84, 91 n. 1 (D.C. Cir. 1965) (McGowan, J.); cf. *United States* v. *Curry*, 358 F.2d 904, 914 (2d Cir. 1965).[88]

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on the issue of punishment. CAL. PENAL CODE, §190.1 (Supp. 1966); CONN. GEN. STAT. REV. §53-10 (Supp. 1965); N.Y. PEN. LAW §§125.30, 125.35 (Cum. Supp. 1968); PA. STAT. ANN., tit. 18, §4701 (1963); TEX. CODE CRIM. PRO., Art. 37.07 (1967). See also §210.6 of the Model Penal Code, note 66, *supra*. In view of the availability of this alternative "split-verdict" mode of procedure which does not entail the deprivation of petitioner's rights, the constitutionally unfair single-verdict procedure used in petitioner's case can obviously not be defended on the ground of necessity. Petitioner, of course, does not contend that the State is constitutionally compelled to have a bifurcated trial. The bifurcated trial is only one of the alternatives available to the State which do not entail the needless burden on capital defendants' constitutional rights here complained of.

[88] Cf. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520 n. 18 (1968), noting that if a defendant could establish that a jury which was representative with respect to penalty was *not* representative with respect to guilt,

> "the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

CONCLUSION

Petitioner's trial jury was permitted lawless and arbitrary power to decide whether he should live or die, in violation of the rule of law that is fundamental to the Fourteenth Amendment. Arkansas' single-verdict capital trial procedure assured that this arbitrary power would be used arbitrarily, by depriving the jury of information requisite to rational sentencing choice, as a consequence of petitioner's exercise of his Fifth and Fourteenth Amendment privilege against self-incrimination. The use of these two procedures at his trial deprived petitioner of his life without due process of law. The judgment below should be reversed.

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APPENDIX A

Evidence and Findings Below Relating to Racial Discrimination by Arkansas Juries in the Exercise of Their Discretion to Sentence Capitally for the Crime of Rape.

A. *The Evidence of the Wolfgang Study.*

Petitioner's second federal habeas corpus petition, giving rise to the proceedings now before the Court, alleged that new evidence had become available with respect to his claim of racial discrimination in capital sentencing, previously urged at his trial, on his direct appeal, and in his initial federal habeas application. It averred, specifically, that a systematic study of Arkansas rape convictions during a twenty-year period had been:

> "conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study." (A. 6, quoted by the court of appeals, at A. 48.)

At a pre-trial conference, the district court was advised that petitioner intended to present at an evidentiary hearing the results of this comprehensive study. Its pre-trial conference order reflected that petitioner's evidence would consist in part of "the testimony of Dr. Marvin E. Wolfgang, a criminologist and statistician on the faculty of the University of Pennsylvania, and . . . certain studies and

a report made by Professor Wolfgang," which in turn were based upon "[b]asic data . . . gathered by law student field workers from various sources and . . . recorded on individual case schedules." (A. 17-18.) Accordingly, the order provided for procedures to facilitate the establishment of "the validity and accuracy of the individual case schedules." (A. 18.)[1a]

> "It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.
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> "Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his

[1a] The "individual case schedules" referred to are the completed forms, for each case of conviction of rape, of the printed schedule captioned "Capital Punishment Survey" admitted as Petitioner's Exhibit P-2 (Tr. 57). [Tr. — references in this Appendix are to the original transcript of the district court proceedings.] The use of this printed schedule in the process of data-gathering was explained by Dr. Wolfgang at Tr. 22-25. Instructions given the field researchers in use of the schedule are included in the record as an exhibit, Petitioner's Exhibit P-3 (Tr. 25-27, 57), but, in view of the respondent's concession that the facts gathered by the researchers were accurate, see text *infra*, no effort was made in the testimony to demonstrate the steps taken in gathering the data to assure reliability. See Tr. 25-27. Also, in light of the court's pre-trial conference order, text, immediately *infra*, the completed "individual case schedules" were not introduced in evidence.

report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no occasion for Petitioner to introduce the schedules in evidence or prove the sources of the information reflected thereon or therein, or to call the individual field workers as witnesses." (A. 18.)

When the case came on for hearing, counsel for petitioner announced that no objections had been filed by the respondent to any of the individual case schedules, so that "all of the facts in the schedules are treated as though they are true, and Dr. Wolfgang's testimony is to be treated as though based not on schedules, but on facts which are established of record . . . As I understand it, the basic facts on which Dr. Wolfgang's testimony and his analysis are made are treated as established for the purpose of this case." (Tr. 8.) Counsel for respondent and the court agreed with this statement (Tr. 8-9), the court settling that:

> "The basic facts—that is, the age of the victim, the race, and so on, of the individual defendants, or the alleged victims—the basic evidentiary facts, as the Court understands it, stand admitted, and that Dr. Wolfgang in testifying, or anybody else who testifies about these basic figures, will not be faced with an objection as to the authenticity of his basic data." (Tr. 9.)[2a]

On this understanding, Dr. Marvin E. Wolfgang was called as a witness for petitioner. In its written opinion, the district court termed him a "well qualified sociologist

[2a] The Court of Appeals accepted this procedure without question. (A. 48.)

and criminologist on the faculty of the University of Pennsylvania" and noted that his "qualifications to testify as an expert are not questioned and are established" (257 F. Supp. at 717-718; A. 33).[3a] (Similarly, the Court of Appeals was later to find that Dr. Wolfgang "obviously is a man of scholastic achievement and of experience in his field," whose " 'qualifications as a criminologist have [concededly] never been questioned by the respondent.' " (398 F.2d at 141; A. 49.)) Dr. Wolfgang's testimony occupies some ninety pages of the transcript of the hearing (Tr. 10-99); in addition, "a written report prepared by him, together with certain other relevant documentary material, was received in evidence without objection" (257 F. Supp. at 717-718; A. 33-34). The written report referred to, Petitioner's Exhibit P-4, was received as substantive evidence (Tr. 57), and will be relied upon together with Dr. Wolfgang's testimony in the summary of evidence that follows.

The district court's opinion fairly summarizes the "background facts of the Wolfgang study":[4a]

> "In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc., to

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[3a] Interrogation of Dr. Wolfgang establishing his qualifications is at Tr. 10-14. In addition, Petitioner's Exhibit P-1, a *curriculum vitae* of Dr. Wolfgang, was received in evidence to establish his qualifications, Tr. 14-16. Dr. Wolfgang is one of the foremost criminologists in the country.

[4a] The general scope of the study, which gathered data concerning every case of conviction for rape during a 20-year period in 250 counties in eleven States, is described more fully in the affidavit of Norman C. Amaker, Esq., attached as Exhibit 2 to the petition for habeas corpus. For other descriptions, see the Memorandum and Order, dated July 18, 1966, appended to the opinion in *Moore v. South Carolina*, 368 F.2d 458 (4th Cir. 1966); and the opinion in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967).

make a study of rape convictions in a number of southern States, including Arkansas, to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women. Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

"As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

"During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

"The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men. No convictions of white men for raping Negro women were found." (257 F. Supp. at 718; A. 34-35. See also the opinion of the Court of Appeals, 398 F.2d at 141-142; A. 49.)

The design of the investigation was described by Dr. Wolfgang as a function of its objectives "to collect the

appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption" (Tr. 17)—i.e., that there is racially differential imposition of the death penalty for rape in the States studied (Tr. 16-17)—and "to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements" (Tr. 17). The basic research methodology involved these several stages: (1) identification of the cases to be studied; (2) collection of data concerning the critical variables (race of defendant, race of victim, sentence imposed) in each case, and statistical analysis of the relationship between these variables; (3) collection of data concerning other variables ("control" variables) in each case, and statistical analysis of the relationship between each such variable and the critical variables (race and sentence) to determine whether the operation of the control variables could explain or account for whatever relationship might be observed between the critical variables; (4) reporting of results of the analysis. It is convenient to summarize the evidence presented to the district court under these four heads, with respect to the Arkansas study. Such a summary can only imperfectly portray the character and range of the Wolfgang study. We respectfully invite the Court's attention to the whole record of the hearing below.

1. Identification of the Cases to Be Studied.

Data were gathered concerning every case of conviction for rape during a 20-year period (January 1, 1945 to the summer of 1965) in a representative sample of Arkansas counties (Tr. 21). Two points should be noted here.

First, because the study begins with cases of *conviction for rape*, it addresses itself at the outset to the possibility

suggested by the Supreme Court of Arkansas on the direct appeal in petitioner's case, *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963), that any showing that Negroes are more frequently sentenced to death for rape than whites might be accounted for by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. What is compared in this study is the rate of capital sentencing of Negro and white defendants *all of whom* have been convicted of rape.

Second, in order to give a valid basis for generalization about the performance of Arkansas juries, *every* case of conviction for rape in a randomly selected sample of Arkansas counties was included in the study (Tr. 62-63). The county sampling procedure was employed because resources available for the field study did not permit the gathering of data in every county in the State (Tr. 21, 107-111), and because it is "unnecessary to collect every individual case, so long as the sample is presumed to be a valid representation—a valid representative one" (Tr. 21). At Dr. Wolfgang's request, a random sample (Tr. 128) of Arkansas' 75 counties was drawn by Mr. John Monroe, a "qualified statistician" (257 F. Supp. at 718; A. 34), with seventeen years experience in sampling and surveys (398 F.2d at 144; A. 53-54).[8a] Testifying below, Mr. Monroe described in detail the sampling process used (Tr. 107-141) to draw counties "in such a manner that the sample counties within each state would provide a representative sampling for that state so that inferences could be drawn for each state in the sample and for the region as a whole" (Tr. 107). Nineteen counties in the State (Tr. 28, 118; 122-123; Petitioner's Ex-

[8a] Mr. Monroe's qualifications appear at Tr. 104-106. His biography, in summary form, was admitted as Petitioner's Exhibit P-10 (Tr. 144-145).

hibit P-5, appendices C, D; Petitioner's Exhibit P-7) containing more than 47 per cent of the total population of Arkansas (Petitioner's Exhibit P-4, p. 1; Tr. 130; 398 F.2d at 144; A. 54) were drawn by a "theoretically unbiased" random method (Tr. 118). Mr. Monroe testified that "a sample is the procedure of drawing a part of a whole, and if this sample is drawn properly according to the law of chance, or with known probability, by examining a small part of this whole, and using the appropriate statistical methods, one can make valid inferences about the whole population from examining a small part" (Tr. 116). He concluded that his own sample of Arkansas counties "is a very reliable sample under the restrictions that we were confined to, the number of counties that could be investigated during the time allotted. In other words, for the size of the sample, the 19 counties, it was a very reliable and highly acceptable sample insofar as sampling statistics are concerned" (Tr. 118; see also Tr. 130, 132). "I would say that, as far as the sample is concerned, the inferences drawn from this sample, as described, are valid for the State of Arkansas" (Tr. 135). See 398 F.2d at 144; A. 54.

(These conclusions were not questioned by the courts below, although, as we shall see, both courts were concerned over the circumstances that Mr. Monroe's areal sampling methods resulted in the selection of counties that lie principally in the southern and eastern portions of the State. This circumstance was apparently not thought to impugn the sample's *factual* representativeness—to the contrary, as the record shows and the district court found (257 F. Supp. at 720; A. 38), the sampling method was "acceptable statistically"—but it was given importance by the *legal* theory of both courts that petitioner was required to show that Garland County, not the State of Arkansas as a

whole, applied the death penalty for rape discriminatorily. Notwithstanding this legal conception, neither court below contested the uncontradicted factual assertions of Mr. Monroe, as an expert statistician, that conclusions drawn from data gathered in his sample counties would be valid for the State of Arkansas. See 398 F.2d at 144; A. 53-55.)

2. Data Concerning the Critical Variables (Race and Sentence) and Statistical Analysis of the Relationship Between Them.

For each individual case of conviction of rape, data were gathered as to race of defendant, race of victim, and sentence imposed (Tr. 28-30).[8a] Using approved statistical techniques, analysis was performed to determine the relationship among these variables (Petitioner's Exhibit P-4, pp. 2-4). Briefly, the analysis involved these steps: (a) erection of a scientifically testable "null hypothesis" "asserting there is no difference in the distribution . . . of the sentence of death or life imprisonment imposed on Negro or white defendants" (Tr. 30-31; see also Tr. 31-32); (b) calculation of a "theoretical or expected frequency" (Tr. 33) which represents the number of Negro defendants and the number of white defendants (or, more specifically, the number of Negro defendants convicted of rape of white victims, and of all other defendants) who would be expected to be sentenced to death if the null hypothesis (that sentence is not related to race) were valid (Tr. 32-33); (c)

[8a] The sources from which these data, and other data relating to the individual cases of rape convictions studied, were obtained is described in detail in Petitioner's Exhibit P-3, pp. 1-6. See note 8a, *infra*. Because the accuracy of all the basic data was conceded by the respondent below, see text *supra* at pp. 1a-3a, methods of data collection and data sources were not developed at the hearing, and Exhibit P-3 was put in merely for the information of the court.

comparison of this "theoretical or expected frequency" with the frequency of death sentences actually observed in the collected data for each racial combination of defendants and victims; and (d) determination whether the discrepancy between the expected and observed frequencies is sufficiently great that, under generally accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested, rather than of the operation of chance within the testing process, sampling, etc. (Tr. 33-37). "If that difference reaches a sufficiently high proportion, sufficiently high number, then the assertion can be made, using again the traditional cut-off point,[1a] that the difference is significant and could not have occurred by chance" (Tr. 34). See 398 F.2d at 142; A. 50. The result of this analysis, then, is the determination whether there is a relationship or "association" between Negro defendants convicted of rape of white victims and the death sentence imposed by Arkansas juries; and if so, whether that relationship or association is "significant" in the statistical sense that the possibility of its occurrence by chance is so slight as properly to be discounted. (See Petitioner's Exhibit P-4, pp. 2-4.) (As we shall see *infra*, such a relationship, showing disproportionately frequent death sentencing of Negroes convicted of rape of white victims, was in fact established by the data.)

[1a] Dr. Wolfgang explained in considerable detail the procedure by which relations among items of observed data are tested statistically for reliability, "not only in sociology and social sciences, but other disciplines as well, . . . such as medical research" (Tr. 36). The basic procedure used in the present study—the chi-square method of statistical analysis and the traditional measure of statistical "significance" which treats as real observed relationships that could not have occurred more than five times out of one hundred by chance (expressed in the formula $P < .05$)—is described at Tr. 33-37, with explication of these matters by reference to the familiar example of head-or-tail coin tossing.

Appendix A

3. Data Concerning "Control" Variables.

Data gathering did not stop, however, with the facts of race and sentence. As explained by Dr. Wolfgang, data were collected on numerous other circumstances attending each case of conviction for rape that "were felt to be relevant to the imposition of the type of sentence" (Tr. 40). These data were sought by the exhaustive inquiries that occupy 28 pages of small type on the data-gathering form that is Petitioner's Exhibit P-2—inquiries concerning the defendant (age; family status; occupation; prior criminal record; etc.), the victim (age; family status; occupation; husband's occupation if married; reputation for chastity; etc.), defendant-victim relationship (prior acquaintance if any; prior sexual relations if any; manner in which defendant and victim arrived at the scene of the offense), circumstances of the offense (number of offenders and victims; place of the offense; degree of violence or threat employed; degree of injury inflicted on victim if any; housebreaking or other contemporaneous offenses committed by defendant; presence *vel non* at the time of the offense of members of the victim's family or others, and threats or violence employed, or injury inflicted if any, upon them; nature of intercourse; involvement of alcohol or drugs; etc.), circumstances of the trial (plea; presentation *vel non* of defenses of consent or insanity; joinder of defendant's rape trial with trial on other charges or trial of other defendants; defendant's representation by counsel (retained or appointed) at various stages of trial and sentencing; etc.), and circumstances of post-trial proceedings if any. See 398 F.2d at 142; A. 50-51.

The district court aptly characterized these factors as "Generally speaking, and subject to certain exceptions, . . . variables . . . which reasonably might be supposed to either

aggravate or mitigate a given rape" (257 F. Supp. at 718 n. 8; A. 35, n. 8). Their exhaustive scope appears upon the face of Petitioner's Exhibit P-2, and from Dr. Wolfgang's testimony: "The principle underlying the construction of the schedule [Petitioner's Exhibit P-2] was the inclusion of all data that could be objectively collected and transcribed from original source documents that were available to the investigators—the field investigators—such as appeal transcripts, prison records, pardon board records, and so forth, and whatever was generally available was included. In this sense, it was a large eclectic approach that was used for the purpose of assuring ourselves that we had all available data on these cases" (Tr. 96-97; see also Tr. 65-70). Dr. Wolfgang conceded that some data potentially pertinent to sentencing choice were not collected—for example, strength of the prosecution's case in each individual rape trial—but explained that this was because such items were not information "that we could objectively collect" (Tr. 97). See 398 F.2d at 142; A. 51.

The pertinency of these data to the study was that some of the many circumstances investigated, "rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of raping white victims" (Tr. 40).

> "These factors, not race, it could be argued, may be determining the sentencing disposition; and Negroes may be receiving death sentences with disproportionate frequency only because these factors are disproportionately frequent in the case of Negro defendants. For example, Negro rape defendants as a group, it may be contended, may employ greater violence or do greater physical harm to their victims than do white rape defendants; they may more frequently be repre-

sented at their trials by appointed rather than retained counsel, and they may more frequently commit contemporaneous offenses, or have a previous criminal record, etc." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 5.)

In order to determine whether the control variables explained or accounted for the racial disproportion in death sentencing, analysis had to be made of the relationship between each such factor for which data were available and sentence on the one hand, race on the other. Dr. Wolfgang explained that no variable could account for the significant association between Negro defendants with white victims and the death sentence unless that variable "was significantly associated with the sentence of death or life" (Tr. 41), and unless it *also* was significantly associated with Negro defendants convicted for rape of white victims (Tr. 41-42).

A variable, even though associated with such Negro defendants (i.e., found disproportionately frequently in their cases), could not furnish a non-racial explanation for their over-frequent sentence to death unless it was itself affecting the incidence of the death sentence (as evidenced by its significant association with the death sentence) (see, e.g., Tr. 45-46); while a variable which was *not* associated with Negro defendants convicted of rape of white victims could also not explain the frequency with which they, as a class, were sentenced to death (e.g., Tr. 49-52). See generally Petitioner's Exhibit P-4, pp. 6-7.

4. Results and Conclusions.

Based on his study of the data gathered for the twenty years 1945-1965 in the State of Arkansas, Dr. Wolfgang con-

cluded categorically that "*compared to all other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death.*" (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 8, para. 3 (original emphasis).) "We found a significant association between Negro defendants having raped white victims and the disproportionate imposition of the death penalty in comparison with other rape convictions." (Tr. 52; see also Tr. 37-39.) Indeed, the disparity of sentencing between Negroes with white victims and all other racial combinations of convicted defendants and victims was such that it could have occurred less than twice in one hundred times by chance (Tr. 37-38)—i.e., if race were not really related to capital sentencing in Arkansas, the results observed in this twenty-year study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ. Thus, the Wolfgang study convincingly documents the discrimination which previously available data—collected less systematically or in a form permitting less rigorous scientific analysis—also suggests: for example, the Federal Bureau of Prisons' National Prisoner Statistics for executions during the period 1930-1962 (Petitioner's Exhibit P-6, Tr. 99-101), which disclose that more than nine times as many Negroes as whites were put to death for rape during this period in the United States. See also pp. 13-16, *supra*, of this brief.

A considerable part of Dr. Wolfgang's testimony was addressed to the question whether this disproportion could be explained away or accounted for by the operation of other, non-racial ("control") variables. He testified that after the Arkansas data were collected, he considered and subjected to analysis every such variable or factor about which sufficient information was available to support scientific study (Tr. 56, 64-65, 78-80, 97). With respect to a substantial

number of the variables investigated by the field researchers, their exhaustive exploration[4a] failed to provide enough

[4a] By reason of the court's pre-trial order and respondent's concession under the procedures fixed by that order that the responses recorded by the field researchers on the individual case schedules were accurate (see pp. 1a-3a, *supra*), petitioner did not present in any systematic fashion below testimony relating to the data-gathering procedures. The concession, of course, included the accuracy of the response "unknown" wherever that appeared on a schedule, and—as counsel for petitioner pointed out in the district court, without disagreement from respondent or the court—the response "unknown" "means that research, using the State's records and using all of the resources that we have poured into this case, is unable to make any better case than this" (Tr. 155-156).

The nature of the research effort involved is indicated by Petitioner's Exhibit P-3 (Tr. 25-27, 57), the instructions to the field researchers. Those instructions include the following, at pp. 4-6:

"Whether the work is done by a single researcher or divided among more than one, the course of investigation of any specific case will ordinarily involve the following steps:

"(1) Inspection of the county court docket books for entries relating to the case.

"(2) Inspection of all other records relating to the case available at the county court: file jackets, transcripts, witness blotters, letter files, pre-sentence reports.

"(3) Inspection of appellate court records in any case where appeal was taken. Appellate court records include the docket of the appellate court, its file jacket, record on appeal (if maintained on file in the appellate court), court opinion or opinions if any, and appellate court clerk's letter file.

"(4) Inspection of prison records of the defendant if he was incarcerated in a prison which maintains records.

"(5) Inspection of pardon board records in any case where the defendant submitted any application for executive clemency.

"(6) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, interview of defense counsel in the case.

"(7) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, inspection of local and area newspaper files for items pertaining to the case.

"Three general directives should be kept in mind:

"(A) We are concerned with the sentencing decision, in each case, of a particular official body at a particular time

information for study. (E.g., victim's reputation for chastity, Tr. 79.) Notwithstanding respondent's pre-trial

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(i.e., the trial judge or jury; the pardon board). Every such body acts—can act—only on the facts known to it at the time it acts. For this reason, the "facts" of a case called for by the schedule mean, so far as possible, the facts perceived by the sentencing body. Facts which we know to have been known to the sentencing body are preferred facts, and sources which disclose them are preferred sources. (A trial transcript, where it exists, is therefore the most desirable source of facts.) Other sources are of decreasing value as the likelihood decreases that the facts which they disclose were known to the sentencing body. (A newspaper story which purports to report trial testimony, therefore, is to be preferred to one which purports to report the facts of the offense on the basis of other sources of information.)

"(B) After this survey is completed, its results will be made the basis for allegations of fact in legal proceedings. If the allegations are controverted, it will be necessary to prove them, and the proof will have to be made within the confines of ordinary evidentiary rules, including the hearsay principle, best evidence rule, etc. For this reason, sources of facts which are judicially admissible evidence to prove the facts which they disclose are preferred sources. Official records are most desirable in this dimension; then the testimony of witnesses having knowledge of the facts (for example, defense counsel), finally, secondary written sources (for example, newspapers). Wherever an official record or document may contain pertinent information, inspect it yourself if you can; don't take somebody's word for what is in it.

"(C) Many of the facts you need to know will have been contested in the judicial and post-judicial proceedings leading to a defendant's sentence and its execution. We have no method for resolving factual disputes or, ordinarily, for knowing how the triers of fact resolved them. As an invariable rule, then, the facts should be reported in the light most favorable to the prosecution, and most unfavorable to the defendant, in every case. If a trial transcript exists, and if it contains the testimony of the complaining witness and of the defendant, resolve all conflicts of testimony in favor of the complaining witness and report the facts as they might reasonably have been found by a jury which credited the complaining witness, drew all rational inferences from her

concession of the accuracy of the field researchers' responses on the individual case schedules, including the response "unknown" where that appeared (see note 8a *supra*), counsel for respondent attempted to suggest in cross-examination of Dr. Wolfgang that these gaps in information impugned the underlying data-gathering process. Dr. Wolfgang replied:

> "the absence of information, I would be unwilling to assert is due to lack of any effort. Very diligent efforts were made by the field investigators to collect the information—from court clerks, from police records, from prisons, from other sources available in the community—and they were instructed to follow down each piece of information, each source of information to its fullest extent, so that I have no reason to doubt that the effort was made to collect the data" (Tr. 80).

His testimony as a whole makes it clear that—although, as he put it: "Information is always limited" (Tr. 72)—he was confident that he had enough of it to support his conclusions. (See particularly Tr. 76-79.)

He was able to subject twenty-two "quite relevant variables" (Tr. 78)—in addition to race of defendant, race of victim, and sentence—to analysis. (See Petitioner's Exhibit P-4, Appendix A; Tr. 29, 52.) Most of these were not significantly associated with sentence, and so Dr. Wolf-

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testimony most strongly against the defendant, discredited the defendant, and refused to draw any disputable inferences in his favor. Treat all other sources in a similar fashion. In interviews with defense counsel, try to impress upon counsel that you have to have the facts as they might have appeared in the worst light for his client. In reading newspaper items which give conflicting versions of the facts, adopt the version most unfavorable to the defendant."

gang could assert categorically that they did not account for or explain the disproportionately frequent death sentencing of Negroes with white victims (Tr. 42-46, 53-54). These variables included the defendant's age, whether he was married, whether he had dependent children, whether he had a prior criminal record; the victim's age, whether she had dependent children; whether the defendant and victim were strangers or acquaintances prior to the offense; place where the offense occurred (indoors or outdoors), whether the defendant committed an unauthorized entry in making his way to that place; whether the defendant displayed a weapon in connection with the offense; degree of seriousness of injury to the victim; and the defendant's plea (guilty or not guilty), type of counsel (retained or appointed), and duration of trial (Tr. 47, 53; Petitioner's Exhibit P-4, p. 9, para. 5; Petitioner's Exhibit P-5). Two variables were shown to bear significant association with sentence: death sentences were more frequent in the cases of defendants who had a prior record of imprisonment, and in the cases of defendants who committed other offenses contemporaneously with the rape. But because these variables were not associated with race,[9a] Dr. Wolfgang concluded that they also could not account for the fact that Negroes convicted of rape of white victims were disproportionately often sentenced to death (Tr. 47-52, 54; Petitioner's Exhibit P-4, pp. 8-9, para. 4; Petitioner's Exhibit P-5). Other variables appeared so frequently or so in-

[9a] Statistical analysis of the association between these variables and race of the defendant disclosed no significant association. When defendant-victim racial combinations were considered, the numbers of cases for which information was available became too small for statistical treatment, but on the basis of trend of association, Dr. Wolfgang concluded that here too there was no association of significance.

frequently in the total population of cases studied that statistical analysis of them was "unnecessary and impossible": the fact that they appeared to characterize all cases (or no cases), irrespective of sentence or of racial combinations of defendant and victim, pointed to the conclusion that they were not available explanations for the relationship observed between death sentences and Negroes with white victims. These variables included the victim's reputation for chastity and prior criminal record; whether the defendant and victim had had sexual relations prior to the occasion of the rape; the degree of force employed by the defendant; whether the victim was made pregnant by the rape; and whether the defendant interposed a defense of insanity at trial (Tr. 54-55, 94-95, Petitioner's Exhibit P-5). Summarizing, Dr. Wolfgang found that no variable of which analysis was possible could account for the observed disproportionate frequency of sentencing to death of Negroes convicted of rape of white victims (Tr. 56-57). His ultimate conclusion was:

> "On the basis of the foregoing findings, it appears that Negro defendants who rape white victims have been disproportionately sentenced to death *by reason of their race*, during the years 1945-1965 in the State of Arkansas." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, pp. 13-14 (emphasis added).)

B. *The Opinion of the District Court.*

Although respondent presented no evidence of any sort in rebuttal, the district court disagreed with Dr. Wolfgang's conclusions. It accepted his finding that the differential sentencing to death of Negroes with white victims "could not be due to the operation of the laws of chance"

(257 F. Supp. at 718; A. 35); but supposed, again without any sort of evidentiary presentation by the State, that it might be due to some factor respecting which statistical analysis had not been possible, such as the issue of consent in rape cases (257 F. Supp. at 720-721; A. 40). The Court remarked that the "variables which Dr. Wolfgang considered are objective . . . broad and in instances . . . imprecise"; that in many of the individual rape cases studied "the field workers were unable to obtain from available sources information which might have been quite pertinent"; and that "Dr. Wolfgang's statistics really reveal very little about the details" of comparative individual cases of rape. (257 F. Supp. at 720; A. 39.) While recognizing that "the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; A. 38), the court noted that the counties randomly chosen had turned out not to be evenly geographically dispersed, and not to include many counties of sparse Negro population (*ibid.*). Garland County, which was not itself included in the sample, is a county of sparse Negro population located in a portion of the State in which the sample counties fell less frequently than elsewhere. For those reasons, the district court declined to conclude that "the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment" (257 F. Supp. at 719; A. 37)—(a subjective proposition, parenthetically, which petitioner's counsel had explicitly disavowed any intention to undertake to prove). With regard to the State of Arkansas generally, the district court thought that the "cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof" of racial discrimination (257 F. Supp. at 720; A. 38).

Placing some reliance on the language in Dr. Wolfgang's written report to the effect that the report was "preliminary" and "tentative" (257 F. Supp. at 720; A. 39), the court concluded:

> "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them." (257 F. Supp. at 720; A. 39-40; see also 257 F. Supp. at 719-720; A. 37-38.)

C. ***The Opinion of the Court of Appeals.***

The court of appeals agreed with the district court in rejecting petitioner's contention that his death sentence must be set aside by reason of racial discrimination in capital sentencing—but for somewhat different reasons. "Like the trial court, . . . although perhaps not for each and all of the reasons it advanced, we feel that the [statistical] argument does not have validity and pertinent application to Maxwell's case." (398 F.2d at 146; A. 59.) "What we are concerned with here is Maxwell's case and only Maxwell's case." (398 F.2d at 147; A. 60.)

The court of appeals, in general, appears to concede the validity of Dr. Wolfgang's methodology, and even of his conclusion that a pattern of racial discrimination has been shown. (398 F.2d at 146-148; A. 59-64.) It finds that Dr. Wolfgang testified his report was "preliminary" only "in the sense that the other states for which data was being col-

lected would be included in the final report." (398 F.2d at 143; A. 52-53.) And the court accepts that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."[10a] Nevertheless the court holds, in effect, that this statistical showing of discrimination is irrelevant because it does "not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination" (398 F.2d at 147; A. 60) or that *Maxwell himself* "was the victim of discrimination based on race" (398 F.2d at 148; A. 64.)

> "[W]hatever . . . suspicion it may arose [sic] with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial." (398 F.2d at 147; A. 61-62.)

This is so because the Arkansas statistics "do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted." (398 F.2d at 146; A. 59.)

> "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a char-

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[10a] (398 F.2d at 148; A. 63.) Despite the generality of the court's language, this finding must relate specifically to the State of Arkansas. This is so because no proof was offered on this record of the results of the Wolfgang study in other States. The only evidence of record with regard to areas outside Arkansas was Petitioner's Exhibit P-6, the National Prisoner Statistics. These show raw numbers of executions for rape and murder, by race, for all the States. (See pp. 13-15 n. 11, *supra*.) They do no more than show that Dr. Wolfgang's conclusions for Arkansas are conformable to the national pattern. Thus, if there is south-wide discrimination, there is most assuredly discrimination in Arkansas.

acter, too. . . . Yet the Garland County statistics [produced in the earlier habeas corpus proceeding] . . . afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.

". . . [W]e are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South." (398 F.2d at 147; A. 61.)

We think it apparent, on a fair reading of the court of appeals' opinion, that that court found unavoidable Dr. Wolfgang's conclusion concerning racial discrimination in capital sentencing by Arkansas juries in rape cases. At the very least, the court of appeals explicitly admitted that there are "recognizable indicators" and "ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it." (398 F.2d at 148; A. 63.)

APPENDIX B

Available Information Relating to the Proportion of Persons Actually Sentenced to Death, Among Those Convicted of Capital Crimes.

It is exceptionally difficult to obtain information which will permit construction of a reliable estimate concerning the proportion of persons actually sentenced to death,[1b] among all those convicted of capital crimes. In order to calculate this proportion, two comparable figures are required: the number of persons convicted of a given capital offense, and the number of persons sentenced to death for it. The figures must be *comparable* in the sense that they relate to the same jurisdiction, the same period of time, and the same offense.

Figures for the number of death sentences imposed during recent years, for each of the several capital offenses, in each of the capital-punishment jurisdictions, may be estimated—albeit somewhat inexactly—from data reported in the National Prisoner Statistics Bulletins on *Executions*. The relevant tables are cited in the footnote,[2b] which also

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[1b] By "persons actually sentenced to death," we mean persons upon whom the sentencing authority, judge or jury, imposes a death sentence. We do not mean to take account of later judicial decisions vacating the sentence, of executive clemency, or of any other factor that may result in the initial death sentence not being carried out.

[2b] The National Prisoner Statistics Bulletins on *Executions* are published annually. The latest is UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 42, Executions 1930-1967 (June, 1968). In the columns below we list the numbers and titles of the issues relied upon in this Appendix, the abbreviation which will hereafter be used to designate each, and the pages and tables of each that contain pertinent information.

Number, title, date	*Abbreviation*	*Page and table*
No. 28, Executions 1961 (April, 1962)	NPS (1961)	p. unnumbered, table 5

sets forth the citation form that will be used hereafter to describe each bulletin. There are several problems with the tables as sources of information relating to the number of persons sentenced to death. First, the figure which they report represents the number of persons received by the respective state penitentiaries from the courts, each year, under sentence of death. This may be fewer than the actual number of death sentences imposed in some states, where the practice is to hold a death-sentenced man in a local facility pending post-verdict motions and/or appeals. Second, for this or other reasons, a few death sentences imposed each year are not reported to the NPS until the following year. The latest NPS Bulletin gives revised figures for prisoners received from court under sentence of death for each year since 1961 (NPS (1967), p. 12, table 4); but these figures are not broken down by jurisdiction and offense. Figures broken down by jurisdiction and offense must be taken from the earlier annual reports, and have not been revised.

But these problems are inconsequential compared to those of ascertaining comparable figures relating to the

Number, title, date	*Abbreviation*	*Page and table*
No. 32, Executions 1962 (April, 1963)	NPS (1962)	p. unnumbered, table 5
No. 34, Executions 1930-1963 (May, 1964)	NPS (1963)	p. 14, table 5
No. 37, Executions 1930-1964 (April, 1964 [sic: 1965])	NPS (1964)	p. 14, table 4
No. 39, Executions 1930-1965 (June, 1966)	NPS (1965)	p. 14, table 4
No. 41, Executions 1930-1966 (April, 1967)	NPS (1966)	p. 13, table 4
No. 42, Executions 1930-1967 (June, 1968)	NPS (1967)	pp. 12-17, tables 4-7

number of convictions for capital offenses. Conviction figures are almost nowhere published. The rare published figures suffer from assorted woes that virtually destroy their usefulness. Some states report judicial statistics for fiscal years, making comparison with the calendar-year NPS reports difficult. Most states report conviction figures for categories of cases ("murder"; "sexual offenses") that include, but are not entirely composed of, capital crimes. Many states report not conviction figures, but figures concerning the number of commitments to the state penitentiary under conviction and sentence for given offenses. These figures omit large numbers of convicted persons: namely, those sentenced to imprisonment in local facilities, or to probation, or whose sentences are suspended. Secondary sources reporting conviction figures suffer from the same defects and often, in addition, they report totals for a span of years that includes both a period of mandatory capital sentencing and a succeeding period of discretionary capital sentencing within a jurisdiction.

Confronted with these problems, we adopt the approach of setting out below all of the information we can find relating to the question of what proportion among all convicted capital offenders are actually sentenced to death. The information comes from a variety of states, for a variety of periods, and has a variety of problems. We report each item separately, and explain its problems as we see them.

A. *Rape.*

1. Partington appears to say that, between 1908 and 1963, there were 2798 offenders committed to the Virginia State Penitentiary upon convictions for the capital crimes

of rape, attempted rape, statutory rape, and attempted statutory rape. There were 68 death sentences in this group, including two imposed upon defendants who had been convicted of capital robbery as well as the sexual offense. For rape alone, there were 1565 commitments, including 41 death sentences. The principal problem with these figures appears to be that the commitment figures are doubtless considerably lower than the number of capital convictions, since some capital offenders would have received jail terms, probation, or suspended sentences. Partington, *The Incidence of the Death Penalty for Rape in Virginia,* 22 WASH. & LEE L. REV. 43, 43-44, 71-73 (1965).

2. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 382 convictions for rape, as compared with 52 death sentences (admissions to death row) upon conviction for rape. The conviction figure seems unduly low, even considering the availability to the jury of verdicts for lesser offenses. Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165, 166 (1957).

3. In the federal courts, where rape is capitally punishable under both the federal code and the District of Columbia Code, there appear to have been a total of 111 rape convictions between July 1, 1961 and June 30, 1966, excluding the fiscal year 1964-1965, for which no figure is reported. For the calendar years 1961 through 1966, no death sentences were imposed for rape by a federal court. Conviction figures are taken from table D5 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1966; death-sentence figures from NPS (1961) through NPS (1966).

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4. Dr. Wolfgang's study of rape convictions in the State of Arkansas described in Appendix A to this brief uncovered 55 instances of conviction for rape in 19 counties over the period 1945-1965. (This figure excludes a few cases which were not subjected to analysis for want of essential information relating to them.) In 14 of the cases, the death sentence was imposed. See Petitioner's Exhibit P-4, Appendix B, table 1.

5. There appear to have been 96 commitments under conviction for capital rape offenses in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 8 men were sentenced to die for rape. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966).

6. There appear to have been 89 commitments under conviction for rape and assault with intent to rape in Maryland between July 1, 1965 and June 30, 1966. During the two calendar years encompassing that one fiscal year, 2 men were sentenced to die for rape offenses. (During these years all rape and assault with intent to rape were capital in Maryland.) STATE OF MARYLAND, DEPARTMENT OF CORRECTION, FORTIETH REPORT (July 1, 1965—June 30, 1966) (1966) 36; NPS (1965); *id.* (1966).

7. There appear to have been 186 commitments under conviction for rape in Georgia between July 1, 1964 and June 30, 1967. During the four calendar years encompassing these three fiscal years, 8 men were sentenced to die for rape. STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964—June 30, 1965) (1965) 56; *id.* (July 1, 1965—June 30, 1966) (1966) 52; *id.* (July 1, 1966—June 30, 1967) (1967) 39; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967).

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8. There appear to have been 21 commitments under conviction for rape in Tennessee between July 1, 1965 and June 30, 1966. During the two calendar years encompassing this fiscal year, 5 men were sentenced to die for rape in the state. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (Year ending June 30, 1966) (pages unnumbered; chart designated: "Offenses Committed"); NPS (1965); *id.* (1966).

9. Because of the extreme paucity of available data relating to the question dealt with in this Appendix, we venture to set forth the figures discovered in Dr. Wolfgang's study of several other states, although as yet unpublished.[3b] Data from six states, in addition to Arkansas, have thus far been analyzed. We give the respective numbers of rape convictions and death sentences for rape during the period 1945-1965 in a representative sample of counties for each state (again excluding cases eliminated from analysis because of lack of essential information).

State	*Rape Convictions*	*Death Sentences*
Alabama	185	20
Florida	218	36
Georgia	369	17
Louisiana	125	22
South Carolina	394	26
Tennessee	213	18

[3b] We feel that there is no impropriety in presenting these figures for the information of the Court, since they serve to cast light on an obscure and essentially non-controversial point. We have of course abstained from making reference to Dr. Wolfgang's findings relating to the impact of racial factors on capital sentencing in other states than Arkansas, since that issue is a more controversial one.

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B. *Murder.*

1. Wolfgang reports that in Philadelphia during the period 1948-1952 there were 77 convictions of first degree murder, as compared with 7 death sentences. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (Science ed., Wiley, 1966) 305-306, table 36.

2. Kalven and Zeisel report 21 death sentences out of a sample of 111 murder cases tried in the years 1954, 1955 and 1958 in which a jury returned a verdict of guilty of a capital degree of the offense, and the presiding judge agreed with their guilty verdict. KALVEN & ZEISEL, THE AMERICAN JURY (1966) 435-436.

3. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 742 convictions for first degree murder, as compared with 162 death sentences (admissions to death row) upon conviction for first degree murder. Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165, 166 (1957).

4. Bedau reports that in New Jersey, between 1916 and 1955, 497 persons were committed to the state penitentiary with life sentences for murder, while 157 persons were sentenced to death for murder. (These are all first degree cases, it would appear, since New Jersey law does not permit life imprisonment for second degree murder. The death penalty for first degree murder was made discretionary in 1916.) The problem here is that the figures for conviction include both jury convictions (entailing jury discretion to sentence to life or death) and court convictions upon a plea of *non vult* (which, under New Jersey law, precludes the death penalty). Bedau, *Death Sentences in New Jersey 1907-1960,* 19 RUTGERS L. REV. 1, 30 (1964).

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Between 1956 and 1960 in New Jersey, Bedau finds 61 first degree murder convictions, resulting in 13 death sentences and 48 life sentences (17 on a jury verdict and 31 on a plea of *non vult*). *Id.* at 51.[4b] These figures may relate only to male convicts, since Bedau received his conviction figures from Edwin Wolf (see next paragraph), who studied the prison records of convicted male offenders.

5. Wolf reports that of 159 convictions by a jury of a male offender for the offense of first degree murder in New Jersey between 1937 and 1961, 62 resulted in a death sentence and 97 in a sentence of life imprisonment. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961*, 19 RUTGERS L. REV. 56, 60 (1964).

6. In the federal courts, where first degree murder is capitally punishable under both the federal code and the District of Columbia Code, there appear to have been a total of 11 convictions for this offense between July 1, 1961 and June 30, 1966, excluding the fiscal year 1964-1965, for which no figure is reported. During the calendar years 1961 through 1966, 2 death sentences were imposed by federal courts for murder. Note that the death-sentence figure relates to a period of six years, including the four for which the conviction figure is given. This awkward form of comparison is necessitated by the problem of relating calendar to fiscal years. Conviction figures are taken from table D5 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1966; death-sentence figures from NPS (1961) through NPS (1966).

[4b] The figure "60" in the lower right-hand cell of table XXVIII ought to be "61." This is so because the figure "4" in the last column for the year 1958 is a typographical error and should read "5."

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7. California reports 88 first degree murder convictions during 1967, as compared with 17 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1967) (1968) 140; NPS (1968).

8. There appear to have been 78 commitments under conviction for first degree murder in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 16 men were sentenced to die for first degree murder. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966).

9. There appear to have been 28 commitments under conviction for first degree murder in Maryland between July 1, 1965 and June 30, 1966. During the two calendar years encompassing that one fiscal year, 4 men were sentenced to die for first degree murder. MARYLAND DEPARTMENT OF CORRECTION, FORTIETH REPORT (July 1, 1965—June 30, 1966) (1966) 36; NPS (1965); *id.* (1966).

10. There appear to have been 269 commitments under conviction for murder in Georgia between July 1, 1964 and June 30, 1967. During the four calendar years encompassing these three fiscal years, 12 men were sentenced to die for murder. (During these years all murder was capital in Georgia, which recognized no degrees of the offense.) STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964—June 30, 1965) (1965) 56; *id.* (July 1, 1965—June 30, 1966) (1966) 52; *id.* (July 1, 1966—June 30, 1967) (1967) 39; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967).

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11. There appear to have been 23 commitments under conviction for first degree murder in Tennessee between July 1, 1965 and June 30, 1966. During the two calendar years encompassing this fiscal year, no men were sentenced to die for murder in the state. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (Year ending June 30, 1966) (pages unnumbered; chart designated: "Offenses Committed"); NPS (1965); *id.* (1966).

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In addition to the figures available for comparison, *supra*, national totals of commitments under sentence of death are reported. These alone give some sense of the extreme infrequency with which persons convicted of capital crimes are actually sentenced to death. Thirty-nine States, the District of Columbia, and the federal jurisdiction all have on their books statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes may be so punishable.[5b] Yet the following numbers of men were received under sentence of death in all of the prisons of the United States in the following years (NPS (1968), p. 12, table 4):

1961 — 140
1962 — 103
1963 — 93
1964 — 106
1965 — 86
1966 — 118
1967 — 85

[5b] See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, Appendix A, pp. 1a-8a.

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NPS (1968), p. 13, table 5, breaks down the figure of 85 for the year 1967 as follows, by offense and race:

	White	Nonwhite	Total
Murder	36	38	74
Rape	1	6	7
Kidnaping	1	0	1
Robbery	0	1	1
Assault by Life Prisoner[6b]	2	0	2
Burglary	0	0	0
	40	45	85

[6b] This is a California offense, carrying a mandatory death sentence.

APPENDIX C

Manner of Submission of the Death-Penalty Issue at Petitioner Maxwell's Trial.

The only instruction to the jury at Maxwell's trial relating to its sentencing function was the following passage, which concluded a lengthy instruction dealing with the substantive law of rape and the principle that, to convict the defendant of rape, the jury must find him guilty beyond a reasonable doubt:

> "If you find the defendant guilty, you will say: 'We the Jury, find the defendant guilty of rape as charged in the information.' If you bring in that verdict then the law fixes the punishment at death and it will be the duty of the Court to sentence him accordingly. But you may bring in this kind of verdict: 'We the Jury, find the defendant guilty of rape as charged in the information and fix his punishment at life imprisonment in the Penitentiary.' But if you find the defendant not guilty, or have a reasonable doubt of his guilt in the whole case, you will say: 'We the Jury, find the defendant not guilty.'" (Trial transcript, p. 332.)

The jury was given three verdict forms in the language just recited, which were read again to the jury before the case was submitted. (*Id.*, at p. 369.)